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THE
AMERICAN
AND
ENGLISH
RAILROAD CASES

A COLLECTION OF ALL THE
RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA
AND ENGLAND.

JAS. M. KERR, - - - - - EDITOR.

WM. M. MCKINNEY, - - - ASSOCIATE EDITOR.

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PENNSYLVANIA R. CO.

v.

AYRES.

(*New Jersey Court of Appeals, Aug. 7, 1888.*)

Highways—Dedication—Reservation—Plats.—Where the owner of a tract of land lays it off in lots and makes a plat of the same with a street one hundred feet wide, designating a railroad track thirty three feet wide along the centre of such street, he thereby reserves the track from the dedication, and persons purchasing lots bounded by such street will take to the line of the track and not to the centre of the street. *Dixon, Magie, Reed, Cole, Clement and McGregor JJ. dissent.*

ERROR in the Supreme Court.

Ejectment to receive land lying along a railroad track in a street. The opinion states the case.

E. T. Green and B. Gummere for plaintiff.

Vail & Ward for defendant.

BEASLEY, C. J.—This is an action of ejectment for a small strip of land, lying next to the railroad, in the city of Rahway, in a street called "Railroad Avenue." The Facts. facts are these: In the year 1835 the New Jersey Railroad & Transportation Company had constructed its road from Jersey City westwardly, through Elizabeth, to the boundary line of a large tract of land belonging to one Brown, lying on the westerly side of Rahway. Just before this Mr. Brown had caused this tract of land to be platted and mapped, and the map to be filed in the office of the county clerk. This map, among other things, shows an avenue called "Railroad Avenue," in the centre of which was platted a double-tracked railroad, a portion of the same being marked by the words "R. R. Depot." Prior to the sale of any lots by Brown, the railroad company, that by its charter was empowered to acquire the lands necessary for its construction in fee-simple, had begun the extension of its road

from the easterly boundary of Brown's land towards New Brunswick, and over this land and along the route marked on the map, as just mentioned, as railroad tracks. Several months after the completion of the railroad over this tract Brown made sale of a lot marked "No. 91" on the map. It is described in the conveyance as being situate on the easterly side of Railroad avenue. Then followed a conveyance from Brown to the company of the railroad track in fee, and after that he conveyed two other lots, marked "93 and 95" on the map, to the father of the plaintiff. These three lots (91, 93, 95) are now the property of the plaintiff. It is claimed that the railroad company has widened its track, and taken into possession more land than was conveyed to it, and it is to recover possession of this parcel of land that this action was brought.

The claim of the plaintiff is that, as his conveyance bounds his lot on the westerly side of Railroad avenue, he thereby acquired title to the street to its centre line. To support this contention, the case of *Salter v. Jonas*, 39 N. J. L. 469, was cited. The rule of law thus appealed to is not in dispute; it is a matter of fact that calls for settlement. This Railroad avenue was marked on the map as 100 feet wide, the railroad track of about 33 feet in width passing through its centre, with an open roadway on each side of it. The question is, did Brown, when he filed this map and made these conveyances, thereby dedicate the entire hundred feet to the public, or only the roadways separated by the railroad track? If the entire area, including the railroad track, was thus given, then the plaintiff, owning to the centre line of such area, is entitled to judgment; but, if only the roadways were given, his action must fail, as his title, in such event, extends only to the centre line of the roadway on which his lot abuts, and therefore will not take in the premises in dispute. The judgment of the supreme court was in favor of the plaintiff, and to that judgment I cannot agree. The case presents a question of dedication, and consequently the inquiry is, what did Brown intend to do? There is nothing before us but the map referred to, and the fact that the railroad was building at the time of its filing, that sheds any light on the subject; and from these *data* alone the supreme court found, as a matter of law, that the legal effect of such a dedication was to vest in the public as a street the entire strip of land 100 feet in width. For my part, from the facts stated, I am constrained to draw the opposite conclusion. When Brown upon his map designated in the centre of his proposed street a railroad track of a definite width, he in effect, according to my apprehension, declared that such designated portion he did not mean to devote to the public use. What he did do, undeniably, was to indicate that this

centre portion of the tract was to be used as a railroad, for the passage of trains of cars drawn by locomotives, which was a use inconsistent with its uses as an ordinary highway. It does not seem to me to be at all reasonable to say that this donor meant to notify the public that the railroad track might be enjoyed by them as a passage-way for themselves and their vehicles. The statute of the state makes it semi-penal for any one to walk or stand upon a railroad track. Can it be said that Mr. Brown had the purpose of bestowing on the community this dangerous privilege? The fact is, it is safe to say that a railroad track, both from its mode of construction and its use, never has been, and never will be, a practicable highway for the passage of man or beast. The consequence is that, as I think, when Mr. Brown signified on his map that he intended to devote this portion of the tract in question to railroad purposes, he not only failed to indicate an intent to give it to the public as a part of a street, but, to the contrary, he made proclamation that such was not his intent. What he did dedicate to the public use was the roadways on each side of the railroad track, and therefore, by his conveyance, the plaintiff's title went to the middle line of such roadway, and did not embrace the premises in dispute. In my opinion, the judgment should be reversed.

DIXON, MAGIE, and REED, Justices, and COLE, CLEMENT, and MCGREGOR, JJ., dissent.

Dedication—Reservation by Proprietors.—See *Redinger v. Marquette* etc., R. Co., 29 Am. & Eng. R. R. Case, 611.

Conveyance of Land Abutting on Street—Bounding by Line of Street—Fee in Street.—Ordinarily if a boundary is to or by the line of an object, such as a house or a lot of land, the exterior limit of the object is intended. So, in common language, if one speaks of the line of a street the exterior limits are understood to be intended. *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51. Consequently, a deed to a lot bounded by stones "on the side of a road," and answering the call for quantity without including the road, does not convey to the centre of the road. *Peabody Heights Co. v. Sadtler*, 63 Md. 533; 52 Am. Rep. 519. And land expressly described as being bounded by a side line of the street is so bounded, and does not carry fee to the centre of the street. *Alameda Macadamizing Co. v. Williams*, 70 Cal. 534; *Baltimore & O. R. Co. v. Gould*, 67 Md. 60; *Holmes v. Turner's Fall Co.*, 142 Mass. 590; *Church v. Stiles*, 59 Vt. 642.

General terms of description in a deed like "to," "upon," or "along" the highway or railroad, do not convey the land to the centre of the highway or railroad unless the grantor owns the fee of the highway or railroad. *Church v. Stiles*, 59 Vt. 642. Where the deed conveying land described the premises as "beginning at a stake and stones on a county road; . . . thence running west bounding north on the land of B. & T.; thence south; . . . thence running southeast to said county road bounded southwest on said county road, etc., it was *held*, that, if the stakes and stones were found to have been on the side of the line of the highway, that the deed included no part of the highway. *Chadwick v. Davis*, 143 Mass. 7. It is said in *Holmes v. Turner's Fall Co.*, 142 Mass. 590, that where in a deed a line runs across a road, and then runs "by the said road on the easterly

and northerly side thereof," the boundary is the easterly and northerly side of the road, unless a contrary intention appears on the face of the deed, and in such case the deed does not convey the fee to the centre of the road. It is said in *Gaylord v. King*, 142 Mass. 495, that the conveyance by a town which owns the soil in the highway of a part of the way which has been set off to the owner of land abutting on the way, does not convey the fee to the centre of the way, where the part conveyed was set off for the purpose of narrowing the way, was not independent land bounded on the way; and where there is nothing in the report of the committee appointed by the town to narrow the way, or in the part of the town to sell the part set off to abutters, which shows an intention to change the title in the soil of the way; that the conveyance will not carry the fee to the way or street.

Same—Boundary by Street Carries Fee to Centre.—In the absence of a statute or an agreement, express or implied, to the contrary, a conveyance of lots in a city bounded by a public street carries with it the fee to the centre of such street as part and parcel of the grant; and the grantee has the exclusive right to the soil subject to the right of way in the public, implied from the original dedication. *Columbus & W. R. Co. v. Withrow*, 82 Ala. 190; *New Orleans & S. R. Co. v. Jones*, 68 Ala. 48, 56; *Perry v. Selma M. & M. R. Co.*, 65 Ala. 391, 400; *Watkins v. Lynch*, 71 Cal. 21; *Wevl v. Sonoma Valley R. Co.*, 69 Cal. 202; *Garnett v. Jacksonville, St. A. & H. R. Co.*, 20 Fla. 889; *Florida Southern R. Co. v. Brown (Fla.)*, 1 So. Rep. 512; *Schneider v. Jacob (Ky.)*, 5 So. W. Rep. 350; *Gould v. Eastern R. Co.*, 142 Mass. 85; *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51; *Wellman v. Dickey*, 78 Me. 29; *In re Robbins*, 34 Minn. 99; *Ayres v. Pennsylvania R. Co.*, 48 N. J. L. (19 Vr.) 44; *Hinchman v. Paterson & H. R. Co.*, 17 N. J. Eq. (2 C. E. Gr.) 75; *Dunham v. Williams*, 37 N. Y. 251; *Bissell v. New York Cent. R. Co.*, 23 N. Y. 61; *Babcock v. Lamb*, 1 Cow. (N. Y.) 238; *Stiles v. Curtis*, 4 Day (Conn.), 328; *Cortelyou v. Van Brundt*, 2 Johns. (N. Y.), 357, 363; *Kohler v. Cleppinger (Pa.)*, 5 Atl. Rep. 750; *Ott v. Kreiter*, 110 Pa. St. 370; *Jarstadt v. Morgan*, 48 Wis. 245; *2 Dill. Mun. Corp. (3d. ed.) s. 633*; *3 Kent, Com. 432, 433*; *Mills, Em. Dom. ss. 31, 62, 80*; *Redf. R. R. s. 159*.

Such boundary will be referred to the street as opened and used. *Cleveland v. Obenchain*, 107 Ind. 591; *O'Brien v. King*, 49 N. J. L. (20 Vr.) 79; *Jackson v. Perrine*, 35 N. J. L. (6 Vr.) 137; *Smith v. State*, 23 N. J. L. (3 Zab.) 130, 712; *Den v. Van Houten*, 22 N. J. L. (2 Zab.) 61; *De Veney v. Gallagher*, 20 N. J. Eq. (5 C. E. Gr.) 33.

Where the Street is Wholly on the Land of the Grantor, and the adjoining land is owned by a stranger, such a deed will carry the fee to the opposite side. *Taylor v. Armstrong*, 24 Ark. 102; *In re Robbins*, 34 Minn. 99. See, however, *Union Depot, etc., R. Co. v. Brunswick*, 31 Minn. 297; *Brisbane v. St. Paul & S. C. R. Co.*, 23 Minn. 114.

Same—Description by Plat.—The grantee of a lot bounded by a public street in a recorded town plat, whether the lot is designated by number, or described by meets and bounds, takes to the centre of the street, unless expressly excluded by the grant. *In re Robbins*, 34 Minn. 99; *Bissell v. Michigan S. & N. I. R. Co.*, 22 N. Y. 258; *Chapin v. Brown*, 15 R. I. 579; *Donohoo v. Murray*, 62 Wis. 100; *Kneeland v. Valkenburgh*, 46 Wis. 434.

In *Gould v. Eastern R. Co.*, 142 Mass. 85, where the deed described land as bounded by certain streets and passageways, as shown upon the plan which was referred to, and the dimensions of the land conveyed were stated to be as shown by the plan, such conveyance was held by implication to include one half of such adjacent streets and passageways, in the absence of a showing of any contrary intention. And in *Clarke v. Gaffaney*, 116 Ill. 362, the owner of a piece of land having made a plat, and divided the

land into lots, five lying on each side of a strip of land running through the centre, and thereafter sold the lots at public auction, publicly announcing that the strip of land had been laid out as a road for the use of the different lots, so as to give access to the main road without travelling over the property of their neighbors, there being no other means of access, it was *held*, that an easement or right of way was thereby created, which passed to the grantees of the original purchaser and qualified the title to the strip of ground, whether in the original owner, in his heirs, or in their grantees. In *Chapin v. Brown*, 15 R. I. 579, the owners of a piece of land platted it into numbered lots with intersecting streets, which plat was duly recorded; the court *held*, that a grantee of one of the lots by a deed in which reference was made to the plat, and which bounded the lot of the streets designated in the plat, was entitled to a right of way over such streets as appertained to the lot, and this without reference to the one by the owner of the fee in the street.

Highways—Dedication—What Constitutes a Dedication.—To constitute a highway by dedication, there must be the assent of the owners of the land to its appropriation for a public highway, and its acceptance or use for such a length of time that the public accommodation and public rights might be materially affected by an interruption of the enjoyment. The owner's intention to dedicate must plainly appear (*San Francisco v. Canavan*, 42 Cal. 541; *Fisk v. Havana*, 88 Ill. 208; *Ross v. Thompson*, 78 Ind. 90; *Bidinger v. Bishop*, 76 Ind. 244; *State v. Welpton*, 34 Iowa, 144; *Hall v. Baltimore*, 56 Md. 187; *Downer v. St. Paul & C. R. Co.*, 23 Minn. 271; *Cook v. Harris*, 61 N. Y. 448; *Wiggins v. Tallmadge*, 11 Barb. (N. Y.) 457; *Galatian v. Gardner*, 7 Johns. (N. Y.) 106; *Village of Watertown v. Cowen*, 5 Paige Ch. (N. Y.) 510; *Parker v. Van Houten*, 7 Wend. (N. Y.) 145; *State v. Wilkinson*, 2 Vt. 480; *Tucker v. Conrad*, 103 Ind. 349; *Jarvis v. Dean*, 3 Bing. 447; *Surrey Canal Co. v. Hall*, 1 Man. & G. 392; *Lade v. Shepherd*, 2 Stra. 1004), and the acceptance of such dedication by use on the part of the public must also be made to appear. See, *In re One Hundred and Sixtieth Street*, New York, 1 N. Y. Sup. 237; *Union Co. v. Peckham* (R. I.), 12 Atl. Rep. 130; *Gilder, Adm'x v. City of Brenham*, 67 Tex. 345; *City of Galveston v. Williams* (Tex.), 6 S. W. Rep. 860.

It is said, however, in *San Leandro v. Le Breton*, 72 Cal. 170, that to make the dedication complete no formal acceptance is necessary. See also *School Dist. v. Heath*, 56 Cal. 478; *Jersey City v. Morris Canal & Banking Co.*, 12 N. J. Eq. (1 Beas.) 547; *Grogan v. Town of Hayward*, 6 Sawy. C. C. 498.

Same—Public Square.—It was *held*, in *Town of San Leandro v. Le Breton*, 72 Cal. 170, that where one owning lands lays off a town or village thereon, and makes a map of the town site on which is represented a public square or plaza, and then sells lots with reference to such map, he thereby makes an complete dedication to the use of the public by the space so represented on the map as a public square. See *Princeville v. Auten*, 77 Ill. 325; *Logansport v. Dunn*, 8 Ind. 378; *Rowan v. Portland*, 8 B. Mon. (Ky.) 233, 248; *Abbot v. Cottage City*, 143 Mass. 524; *Commonwealth v. Fisk*, 49 Mass. (8 Metc.) 238, 243; *Vick v. Vicksburgh*, 2 Miss. (1 How.) 379; *Drummer v. Jersey City*, 20 N. J. L. (1 Spen.) 86; *Bayonne v. Ford*, 43 N. J. L. (14 Vr.) 292; *M. E. Church v. Hoboken*, 33 N. J. L. (4 Vr.) 25; *Cady v. Conger*, 19 N. Y. 256, 261; *Perrin v. New York Cent. R. Co.*, 40 Barb. (N. Y.) 65; *Trustees of Watertown v. Cowen*, 5 Paige Ch. (N. Y.) 510; *In re Thirty-second Street*, 19 Wend. (N. Y.) 130; *Livingston v. Mayor of New York*, 8 Wend. (N. Y.) 85; *Huber v. Gazley*, 18 Ohio, 18; *Carter v. City of Portland*, 4 Oreg. 339; *Com. v. Rush*, 14 Pa. St. 186; *Abbott v. Mills*, 3 Vt. 521, 526; *New Orleans v. United States*, 35 U. S. (10 Pet.) 667, 713; bk. 9, L. ed. 573; *Cincinnati v. White*, 31 U. S. (6 Pet.) 431; bk.

8, L. ed. 452; *Ruch v. Rock Island*, 5 Biss. C. C. 95; *Grogan v. Town of Hayward*, 6 Sawy. C. C. 498; s. c., 4 Fed. Rep. 461. See *Stone v. Brooks*, 35 Cal. 501; *Kittle v. Pfeiffer*, 22 Cal. 489; *Rowan's Exrs. v. Town of Portland*, 8 B. Mon. (Ky.) 232; *Bartlett v. Bangor*, 67 Me. 464; *Briel v. City of Natchez*, 48 Miss. 423; *Wiggins v. McCleary*, 49 N. Y. 346.

Same—Dedication by Platting.—It is said by the supreme court of Kentucky, in the case of *Schneider v. Jacob*, 5 S. W. Rep. 350, that the act of dividing up a parcel of land into lots, streets, and alleys, and selling the lots with clear reference to a map or plat representing such divisions, is an immediate and conclusive dedication of such streets and alleys to the use of the purchaser and the public. See also *Town of San Leandro v. Le Breton*, 72 Cal. 170; *Quinn v. Anderson*, 70 Cal. 454; *Fulton v. Town of Dover (Del.)*, 6 Atl. Rep. 633; *Maywood Co. v. Village of Maywood*, 118 Ill. 61; *Mattheisen & H. Z. Co. v. City of La Salle*, 117 Ill. 411; *Evansville v. Evans*, 37 Ind. 229; *Shea v. City of Ottumwa*, 67 Iowa, 39; *Stange v. Hill & W. D. S. R. Co.*, 54 Iowa, 669; *Brooks v. Topeka*, 34 Kan. 277; *Hurley v. Mississippi & R. R. B. Co.*, 34 Minn. 143; *Morse v. Zeize*, 34 Minn. 35; *Gregory v. City of Lincoln*, 13 Neb. 352; *Village of Watertown v. Cowen*, 5 Paige Ch. (N. Y.) 510; *Post v. Pearsall*, 22 Wend. (N. Y.) 435; s. c., 20 Wend. 116; *Wyman v. Mayor of New York*, 11 Wend. (N. Y.) 486; *In re Pearl Street*, 111 Pa. St. 565; *Chapin v. Brown*, 15 R. I. 579; *Donohoo v. Murray*, 62 Wis. 100; *United States v. Chicago*, 48 U. S. (7 How.) 185; bk. 12, L. ed. 660; *Barclay v. Howell*, 31 U. S. (6 Pet.) 498; bk. 8, L. ed. 477; *New Orleans v. United States*, 35 U. S. (10 Pet.) 718; bk. 9, L. ed. 595; *Cincinnati v. White*, 31 U. S. (6 Pet.) 431; bk. 8, L. ed. 452; *Smith v. City of Portland*, 30 Fed. Rep. 734; *Woodyer v. Hadden*, 5 Taunt. 125.

In the case of *Hier v. New York, W. S. & B. R. Co.*, 109 N. Y. 659, affirming s. c., 40 Hun (N. Y.), 310, where the state had mapped out, by public streets, blocks, and lots, certain of its lands, and thereafter conveyed certain of such lots in one of the blocks "as known and designated" on said map, the court held, that the grantee did not acquire such an easement in the street on which his lots fronted, beyond the block in which his lots were situated, as entitled him to compensation for, or to enjoin, the obstruction of such street on another block, by a railroad company under permission from the State and municipality—it appearing that the cross-streets at each end of his blocks afforded passage to and from his premises, and that passage through the street on which his lots fronted, beyond his block and where the obstruction existed, was merely a convenience and not a necessity.

Under Colo. Rev. Stat. 1868, p. 619, § 5, by the dedication to the city of Denver of the streets of an addition thereto, platted in accordance with the provision of the statute in force in May, 1876, the said city acquired only a qualified fee therein, in trust for the public for the ordinary and necessary purposes to which the streets of a city are usually subjected. *Denver Circle R. Co. v. Nestor*, 10 Colo. 403.

Same—Easement in Public.—Where land is platted with streets and alleys and the lots are sold with reference to such plat, the public acquire only an easement in such streets and alleys. See *Robert v. Sadler*, 104 N. Y. 229; *Fanning v. Osborne*, 102 N. Y. 441; *Wiggins v. McCleary*, 49 N. Y. 346; *Bissell v. New York Cent. R. Co.*, 23 N. Y. 61; *Adams v. Saratoga & W. R. Co.*, 11 Barb. (N. Y.) 450; *Village of Watertown v. Cowen*, 5 Paige Ch. (N. Y.) 510.

The dedication of a street to the public does not authorize it to be used for an ordinary railroad track; and the municipal authorities cannot authorize it to be so used without compensation to adjacent owners. *Grand*

Rapids & I. R. Co. v. Heisel, 47 Mich. 393; Burlington & M. R. Co. v. Reinhackle, 15 Neb. 279.

But a dedication of land to public use as a highway may be made subject to a right to designate a portion thereof for use for railroad purposes; and when such portion has been designated and dedicated to such purpose, the public use will be suspended in that portion of the road, and remain suspended so long as that portion is divided to such purpose. *Ayres v. Pennsylvania R. Co.*, 48 N. J. L. (19 Vr.) 44.

ADAMS

v.

CHICAGO, BURLINGTON AND NORTHERN R. CO.

(*Minnesota Supreme Court, Oct 15, 1888.*)

Municipal Corporation—Abutting Property-owner—Easement in Light and Air.—The owner of a lot abutting on a public street in a city has, as appurtenant to the lot, and independent of the ownership of the fee of the street, an easement in the street to the full width thereof, in front of the lot, for admission of light and air to his lot; which easement is subordinate only to the public right in the street (*Vanderburgh, J. dissenting*).

Same—Eminent Domain—What a Public Use.—Depriving him of, or materially interfering with, his enjoyment of the easement for any public use not a proper street use, is a taking of his property for public use within the meaning of the Constitution (*Vanderburgh, J., dissenting*).

Same—Use of Street for Railway—Abuse of Use.—Appropriating a public street to use for an ordinary commercial railroad is not a proper street use.

Same—Compensation—Right to.—Whenever without his consent, and without compensation to him, such a railroad is laid and operated along the portion of the street in front of his lot so as upon that part of the street to cause smoke, dust, cinders, etc., which darken and pollute the air, coming upon the lot from that part of the street, the lot owner may recover whatever damages to his lot are thus caused by so laying and operating the railroad.

Same—Damages—Measure of.—A new trial of the issue as to amount of damages ordered, unless plaintiff consent to take judgment for nominal damages merely.

APPEAL by defendant from a judgment of the Winona County District Court, for consequential damages resulting from the building of a railroad in a public street in front of plaintiff's premises.

The facts are stated in the opinion.

Wm. Gale and *J. W. Losey* and *Young & Lightner* for appellant.

Tawney & Randall for appellee.

GILFILLAN, Ch.J.—Second Street, in the city of Winona, is, and for thirty years has been, a public street, seventy feet wide running nearly east and west through the city. Plaintiff is the

Facts. owner of and occupies as his residence a lot abutting on the south side of said street. The defendant, under authority of the common council—which authority the city charter empowered the council to give—has constructed and is operating the main line of its railroad, an ordinary commercial railroad, running to and through Winona, upon and along the north half of Second Street passing in front of plaintiff's lot, no part of the track being laid south of the centre line of the street. Safe and convenient ingress and egress to and from plaintiff's lot are not materially impaired.

The injurious consequences to the lot are not due to any improper construction or operation of the road, but are such as result from constructing and operating a railroad along a street in an ordinary and prudent manner. These injurious consequences arise from the engines and trains passing day and night, and throwing steam, smoke, dust, and cinders upon the plaintiff's premises and into his house, polluting the air with offensive smells, and interfering with the free circulation of light and pure air into and upon his premises, and jarring the ground so as to cause the house and furniture to vibrate; causing physical discomforts and annoyances to plaintiff and his family, and whereby the rental value of his premises is diminished. The court below ordered judgment for the plaintiff for the damage to the rental value up to the commencement of the action, and the defendant appeals.

The principal question involved has never been directly before this court. There have been, however, cases in which the decisions bore incidentally upon it. It is well settled that where there is no taking of, or encroachment on, one's property or property rights by the construction and operating of a railroad, any inconveniences caused by it, as from noises, smoke, cinders, etc., not due to improper construction or negligence in operating it, furnish no ground of action—as: when the railroad is laid wholly on land which the company has acquired by purchase or condemnation, or in which the party has no interest, so that it does no wrong to him in constructing and operating the road, —though there may be some inconvenience or damage to him arising from it, if it be such as the general public suffer, he has no legal cause to complain.

Railroads are a necessity, and the public, which enjoys the general incidental benefits from them, must endure any general inconveniences necessarily incident to their construction and operation. And if a railroad company even wrongfully obstructs

Common inconvenience merely gives no ground of action.

a street abutting on one's premises, not at the part of the street where it so abuts, unless access to his premises is thereby cut off or materially interfered with, any inconvenience that he may suffer therefrom furnishes no ground for a private action, because the wrong done is a public wrong, for which the public authorities are the proper parties to seek redress. See *Shaubut v. St. Paul & S. C. R. Co.*, 21 Minn. 502; *Rochette v. Chicago, M. & St. P. R. Co.*, 32 Minn. 203; *Barnum v. Minnesota Trans. Co.*, 33 Minn. 365.

But if a railroad, not touching one's premises, obstructs a street abutting on or leading to them, so as to cut off or materially interfere with his only access to them, the inconvenience is deemed to be special, and not one common to the public; and an action lies. *Braken v. Minneapolis & St. L. R. Co.*, 29 Minn. 41.

Special inconveniences—
Blocking up
streets, etc.

It is the same where one owns land abutting on a navigable river or lake, and a railroad is laid along between the land and the navigable water (*Brisbine v. St. Paul & S. C. R. Co.*, 23 Minn. 114; *Union Depot v. Brunswick*, 31 Minn. 297); and also where a strip between the lots and the river has been dedicated to public use as a levee or landing, and a railroad is laid upon it. *Schurmeier v. St. Paul & P. R. Co.*, 10 Minn. 82.

Where, however, there is a taking of a part of a tract or lot of land, the diminution in value of the part not taken, caused by the noise of passing trains, and inconvenience and interruption to the use of the part not taken, resulting from the ordinary operation of the road (*Blue Earth County v. St. Paul & S. C. R. Co.*, 28 Minn. 503), and from increased exposure of buildings already erected to danger of fire from passing trains (*Colvill v. St. Paul & C. R. Co.*, 19 Minn. 283; *Johnson v. Chicago, B. & N. R. Co.*, 37 Minn. 519), and from increased danger of injury to or destruction of the household of the owner unless the property not taken is equally valuable for some other purpose (*Curtis v. St. Paul, S. & T. F. R. Co.*, 20 Minn. 28),—are proper elements of the damage to be allowed for the taking.

Taking of part
of tract—
Damages to
residue.

From these decisions the propositions may be stated: That the right of recovery against a railroad company, when there is no improper construction of or negligence in operating the railroad, for inconveniences caused by noises, smoke, dust, and cinders, does not depend on the fact that such inconveniences exist, if they be such as are common to the public at large, but on the fact that there has been a taking of the parties' property for the purpose of the railroad, accompanied with such inconveniences, or to which they are incident; and, if necessarily caused by the company's proper use of its own

Right of recovery for inconveniences—
Taking of
property.

property, there can be no recovery because of them; and that, where there is a taking, such inconveniences as are necessarily incident to it, and to the use for which the property is taken, are proper elements of the damages to the party; and this further proposition (fully established and more clearly set forth in many other decisions of this court) that the rule of damage is applied only to a case where part of a distinct tract or lot is taken, in which case the damages only to the part not taken are to be estimated. As to that only are the damages deemed special. As to other distinct tracts or lots of the same owner the inconveniences are generally such as the public suffer.

As the plaintiff does not claim to own the land in the street which the company has taken for its road, but claims only a right or interest in the nature of an easement in it appurtenant to his lot, the question has been raised and discussed, at considerable length, whether, conceding the right or interest he claims, the acts of the defendant constitute a taking within the constitutional provision prohibiting the taking of private property for public use without just compensation. As that provision is inserted for the protection of the citizen, it ought to have a liberal interpretation, so as to effect its general purpose. All property, whatever its character, comes within its protection.

It is hardly necessary to say that any right or interest in land in the nature of an easement is property, as much so as a lien upon it by mortgage, judgment, or under mechanic's lien laws. If a man is deprived of his property for the purpose of any enterprise of public use, it must be a taking, even though the right of which he is deprived is not and cannot be employed in the public use. In the case of a lien on land taken for railroad purposes, the company cannot make any use of the lien. It does not succeed to the ownership of it. It merely displaces it,—destroys it.

So, in case of an easement. If A has, as appurtenant to his lot, an easement for right of way over the adjoining land, and such adjoining land is taken for railroad purposes, the company does not and cannot succeed to the easement. But it may destroy or materially impair it by rendering it impossible for the owner of it to enjoy it to the full extent that he is entitled to. Such destruction or impairment is within the meaning of the word "taken," as used in the Constitution, as fully as is the depriving the owner of the possession and use of his corporeal property.

The main question in the case is, Has the owner of a lot abutting on a public street a right or interest in the street opposite

Whether acts
of defendant
constitute
taking.

Impairment of
easement con-
stitutes tak-
ing.

his lot, as appurtenant to his lot, and independent of his ownership of the soil of the street, and, if so, what is that right or interest? If he has, and the acts of the defendant in constructing and operating its railroad along that part of the street opposite plaintiff's lot prevents or impairs his enjoyment of such right or interest, then he has a right to recover.

Interest of
abutting
owner in
street.

We find a great many cases in which is stated, in general terms, the proposition that, although the fee of the street be in the state or municipality, the owner of an abutting lot has, as appurtenant to his lot, an interest or easement in the street in front of it, which is entirely distinct from the interest of the public. *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 294; *Lexington, etc., R. Co. v. Combs*, 10 Bush, 382; *Haynes v. Thomas*, 7 Ind. 38; *Protzman v. Indianapolis & C. R. Co.*, 9 Ind. 467; *Stone v. Fairbury, P. & N. W. R. Co.*, 68 Ill. 394; *Tate v. Ohio & M. R. Co.*, 7 Ind. 479; *Lackland v. North Missouri R. Co.*, 31 Mo. 180; *Cincinnati, etc., Street R. Co. v. Cumminsville*, 14 Ohio St. 523; *Railway Co. v. Lawrence*, 38 Ohio St. 41; *Crawford v. Village of Delaware*, 7 Ohio St. 459; *Denver v. Bayer*, 7 Colo. 113; *Rensselaer v. Leopold*, 106 Ind. 29.

In 38 Michigan, 62, the supreme court states it thus: "Every lot-owner has a peculiar interest in the adjacent street, which neither the local nor general public can pretend to claim; a private right in the nature of an incorporeal hereditament, legally attached to his contiguous ground; an incidental title to certain facilities and franchises which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be owner."

Although the proposition was apparently stated with care and upon deliberation, it seems to us (and we say it with diffidence, because of the eminent character of that court) that the decision of the case was a departure from the doctrine thus laid down—and the same may, be said of several of the cases referred to; for where the railroad was laid upon a part of the street opposite the party's lot, of which part he did not own the fee, it denied his right to recover for damages caused to his lot incidental to a proper operating of the railroad, and limited it to cases where the acts of the company, of omission or commission, amounted to a nuisance.

As the lot-owner can recover for a private nuisance committed by the improper operation of a railroad, even on the company's own land, in which he has no interest (*Baltimore & P. R. Co. v. First Baptist Church*, 108 U. S. 317; s. c., 11 Am. & Eng. R. R. Cas. 15), it would seem as though, if he is in no better plight in respect to the company's acts in the street, his "peculiar inter-

est," distinct from that of the public, in the street, is of very little value. His title to his interest in the street is precarious, if authority from the state or municipality may justify what would without such authority be a private wrong as to him. None of the cases we have referred to, nor any till we come to what are known as the Elevated Railway Cases, attempt to define the limits and extent of the right of an abutting lot-owner in the street opposite his lot, where he does not own the fee. That it extends to purposes of ingress and egress to and from his lot is conceded by all. And for this purpose it may extend beyond the part of the street directly in front; for, as we have seen, an action by him will lie for obstructing the street, away from his lot, so as to cut off or materially interfere with his only access to it.

The questions are asked, How does the lot-owner get an easement in the street? What are the source and evidence of his title to his peculiar interest? The same questions may be asked with respect to the right or interest of the public. When a street is established by statutory dedication or proceedings of condemnation, the public derives its right through the dedication or proceedings, and the record of them is the evidence of its right. When the dedication is at common law, the evidence of the public right rests in parol. When the offer of dedication is made, and is accepted and acted upon by the public to such extent that to permit the offer to be withdrawn would operate as a fraud, the title of the public to its right is completely vested. And such title is none the less perfect because there may be no express grant of the right, and no written evidence of it. The private right is vested by the same proceedings or acts that vest the public right. There is no need of express grant in one case more than in the other. In the case of dedication, after it has become perfect the abutting lot-owners are presumed to act with respect to their lots on the faith of it, as they are also in case of condemnation.

Suppose one buys a piece of land fronting on a public street, or suppose he improves it, say, by erecting buildings with reference to use in connection with the street, would it not be a fraud on him to afterwards close the street? Not only do the abutting lot-owners pay for all the advantages which the street may furnish to their lots in the enhanced price of the lots, but, in cases of condemnation, their lots are liable to be, and are usually, specially taxed to pay the whole cost of the land taken; and, whether the street be established by dedication or condemnation, the abutting lots are liable to be, and are usually, specially taxed for the whole cost of putting and keeping it in proper condition for public use. It would be hard to justify the im-

How lot-owner
obtains ease-
ment.

position of these taxes on them instead of on the public at large, if their owners have no other interest in or advantage from the street beyond the public at large, or if such interest or advantage is of so precarious a tenure that they may at any time be deprived of it.

It is, however, hardly necessary to inquire how the lot-owner gets his private right in the street; for it is established law that he has a private right, which, as we have stated, all the cases concede extends to the necessity of access. Access to the lot is only one of the direct advantages which the street affords to it. In a city densely peopled and built up, the admission of light and air into buildings is about as important to their proper use and enjoyment as access to them. Light and air are largely got from the open space which the streets afford.

Private rights
of lot-owner in
street.

What reason can be given for excluding a right to the street for admitting light and air, when the right to it for access is conceded? For mere purposes of access to the lots, a strip ten or fifteen feet wide might be sufficient. Yet everybody knows that a lot fronting on a street sixty or seventy feet wide is more valuable, because of the uses that can be made of it, than though it front on such a narrow strip. Take a case in one of the states where the fee of the streets is in the state or municipality, and of a street sixty feet wide. The abutting lot-owners have paid for the advantages of the street on the basis of that width, either in the enhanced price paid for their lots, or, if the street was established by condemnation, in the taxes they have paid for the land taken. In such a case, if the state or municipality should attempt to cut the street down to a width of ten or fifteen feet, would it be an answer to objections by lot-owners that the diminished width would be sufficient for mere purposes of access to their lots? It would seem as though the question suggests the answer.

Same—Right
to street for
admitting
light and air.

The cases known as the Elevated Railway Cases (*Story v. N. Y. Elevated R. Co.*, 90 N. Y. 122; s. c., 7 Am. & Eng. R. R. Cas. 596; and *Lahr v. Metropolitan Elevated R. Co.*, 104 N. Y. 268) are notable in several respects: first, because they were the first cases (and it seems strange that they should have been) in which was squarely presented, so as to demand a direct decision, the claim of abutting lots to an easement in the street in their front, for purposes of light and air; second, for the number and ability of the counsel on each side, and the thoroughness with which they discussed every point involved, and presented every argument *pro* and *con* that could be suggested; and, lastly and especially, for the exhaustive character of both the prevailing and dissenting

Elevated rail-
road cases.

opinions by the members of the court. The latter case was really a reargument of the questions decided in the earlier; and in its opinion the court not only adhered to, but took pains to define, its earlier decision, and in some respects to go beyond it, and give to the principles determined a wider application than appears to have been given to them in the first case. We think that in some cases the doctrine is unqualifiedly established that no matter how the abutting owner acquires title to his land, and no matter how the street was established, so that the only right of the public is to hold it for public use as a street forever (and the public gets no greater right under a dedication), and no matter who may own the fee, "An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property which belong to him by reason of its location, and are not enjoyed by the general public; such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property."

The doctrine was followed and applied by the circuit court of the United States for the southern district of New York in *New York Nat. Bank v. New York Elevated R. Co.*, 24 Fed. Rep. 114.

The general doctrine, we think, stands on sound reason and considerations of practical justice.

The private right in a street is of course subordinate to the public right. The latter right is for use as a public street, and the incidental right to put and keep it in condition for such use, and for no other purpose. Whatever limitation or abridgment of the advantages which the abutting lot is entitled to from the street may be caused by the exercise of the public right, the owner of the lot must submit to. If putting it to proper street uses causes annoying noises to be made in front of his lot, or the air to be filled with dust and smoke, so as to darken his premises, or pollute the air that passes from the street upon them, he has no legal cause of complaint. His right to complain arises when such interruptions to the enjoyment of his private right are caused by a perversion of the street to uses for which it was not intended; by employing it for uses which the public right does not justify. That constructing and operating an ordinary commercial railroad on a street is a perversion of the street to a use for which it was not intended; one not justified by the public right; and which the state or municipality, as representing such right, cannot, as against private rights, authorize,—the decisions of this court are full and explicit. It has always been held here, contrary to the decisions in many of the states, that laying such a railroad upon a public street or highway is the imposition of an additional servitude upon it,—an appropriation

Nature of private right in street.

of it to a use for which it was not intended. *Carli v. Stillwater Street R. & Trans. Co.*, 28 Minn. 373; s. c., 3 Am. & Eng. R. R. Cas. 226 and cases cited.

Many of the decisions cited, to show that upon a state of facts such as exists in this case the lot-owner can have no right of action, were by courts which hold that the use of a street for an ordinary railroad is a legitimate street use—one that comes within the uses and purposes for which streets are established. Where that is the rule, inasmuch as the right or interest of the abutting lot-owner is subordinate and subject to the right to devote the street to use for a railroad, as well as for any other proper mode of street travel, of course no cause of action in favor of the lot-owner, whether he owns the fee of the street or not, could grow out of the proper construction and operating of a railroad in the street. For that reason the decisions of such courts can be of no authority here, where a different rule upon the rightfulness of using the street for such a purpose prevails.

Decisions of no authority.

The conclusions arrived at are that the owner of a lot abutting on a public street has, independent of the fee in the street, as appurtenant to his lot, an easement in the street in front of his lot to the full width of the street, for admission of light and air to his lot; which easement is subordinate only to the public right; that depriving him of or interfering with his enjoyment of the easement for any public use not a proper street use is a taking of his property within the meaning of the Constitution; that appropriating a public street to the construction and operation of an ordinary commercial railroad upon it is not a proper street use; that where, without his consent and without compensation to him, such a railroad is laid and operated along the portion of the street in front of his lot, so as upon that part of the street to cause smoke, dust, cinders, etc., which darken or pollute the air coming from that part of the street upon his lot, he may recover whatever damages to his lot are caused by so laying and operating such railroad on that part of the street; that the recovery should be limited to the damages caused by operating the railroad in front of plaintiff's lot, and ought not to include any that might have accrued from operating it on other parts of the street, was undoubtedly the opinion of the court below when it came to make its findings of fact; for it finds as a fact no other damage than the depreciation in the rental value of the lot caused by operating the railroad on the street in front of it.

Conclusions reached—Lot-owner's right to damages.

The proof of depreciation in rental value, however, was made in part by admitting proof (against defendant's objection) of the rental value "with the road constructed on that street, and operated there as roads usually are." There was no other

evidence of depreciation. The evidence takes into account, not merely the consequences to the lot from operating the railroad in front of it, but also from operating the road on the whole or any part of it, however remote from the lot. This would allow plaintiff to recover for such consequences of operating the road as he suffered in common with the public generally, and not merely such as were peculiar to himself. The evidence was erroneously admitted, and, as there was no competent evidence to sustain the finding of the amount of damage, the finding must be set aside.

A new trial is therefore ordered of the issue as to the amount of damage (but of no other issue), unless the plaintiff will consent in the court below to take judgment for nominal damages merely.

VANDEBURGH, J., dissenting.—If a street or highway is so occupied or incumbered as to occasion special and peculiar injury to an abutting land-owner, an action for damages or an injunction may be sustained. But I do not assent to the proposition that such owner has property interests in the street, beyond the boundary of his land therein (presumptively the centre line thereof), which are the proper subject of condemnation proceedings. The opposite rule, I think, has always been accepted and acted on in this state, and is supported by the great weight of authority. It is hardly practicable to make any distinction in this respect between that portion of the street beyond his boundary and opposite his lot and adjoining land in the street on either side thereof. And it would seem to be difficult to fix upon any sound rule or safe basis for estimating and limiting the damages in such cases.

See, generally, note to *Columbus, etc., R. Co. v. Gardner*, 32 Am. & Eng. R. R. Cas. 251; *Bolton v. Short Route R. Co.*, 32 Am. & Eng. R. R. Cas. 256; *Texarkana, etc., R. Co. v. Goldberg*, 32 Ib. 240; *Indiana, etc., R. Co. v. Eberle*, 32 Ib. 220; *Denver, etc., R. Co. v. Bourne*, 32 Ib. 227; *Kavanagh v. Mobile, etc., R. Co.*, 32 Ib. 267, and cases cited from this series in the above opinion.

Railways in Street—Rights of Abutting Owners.—The easement of the abutting owners of a public street or highway is property which may not be taken or impaired without compensation being made therefor. See, *City of Denver v. Bayer*, 7 Colo. 113; *Daly v. Georgia S. & F. R. Co.* (Ga.), 7 S. E. Rep. 146; *Terre Haute & L. R. Co. v. Bissell*, 108 Ind. 113; *McClean v. Chicago, I. & D. R. Co.*, 67 Iowa, 568; *Hanson v. Chicago, M. & St. P. R. Co.*, 61 Iowa, 588; *Mulholland v. Des Moines, M. & W. R. Co.*, 60 Iowa, 740; s. c., 10 Am. & Eng. R. R. Cas. 99; *Drady v. Des Moines & Ft. D. R. Co.*, 57 Iowa, 393; *Stanley v. City of Davenport*, 54 Iowa, 463; *Ward v. Detroit, M. & M. R. Co.*, 62 Mich. 46; *Barkken v. Minnesota & St. L. R. Co.*, 29 Minn. 41; *Carli v. Stillwater, St. R. & T. Co.*, 28 Minn. 373; s. c., 3 Am. & Eng. R. R. Cas. 226; *Omaha & R. V.*

R. Co. *v.* Rogers, 16 Neb. 117; s. c., 20 Am. & Eng. R. R. Cas. 79; Burlington & M. R. R. Co. *v.* Reinhackle, 15 Neb. 279; s. c., 14 Am. & Eng. R. R. Cas. 169; Hastings & G. I. R. Co. *v.* Ingalls, 15 Neb. 123; s. c., 20 Am. & Eng. R. R. Cas. 60; Gottschalk *v.* Chicago, B. & Q. R. Co., 14 Neb. 550; s. c., 14 Am. & Eng. R. R. Cas. 157; Jewett *v.* Union E. R. Co., 1 N. Y. Supp. 123; Pittsburgh Junction R. Co. *v.* McCutcheon (Pa.), 7 Atl. Rep. 146; City of Cleburne *v.* Gulf, C. & S. F. R. Co. (Tex.), 25 Am. & Eng. R. R. Cas. 130; Buchner *v.* Chicago, M. & N. W. R. Co., 60 Wis. 264; s. c., 14 Am. & Eng. R. R. Cas. 447; Buchner *v.* Chicago, M. & N. W. R. Co., 56 Wis. 403; Mollandin *v.* Union Pac. R. Co., 14 Fed. Rep. 394; Grafton *v.* Baltimore & O. R. Co., 21 Fed. Rep. 309; s. c., 17 Am. & Eng. R. R. Cas. 200.

The Authorities of a City have no power to authorize a railroad company to permanently appropriate and obstruct a portion of a street, without compensation to such lot-owners as abut thereon, and who are especially injured. Burlington & M. R. R. Co. *v.* Reinhackle, 15 Neb. 279; s. c., 14 Am. & Eng. R. R. Cas. 169. And for this reason if a railroad company constructs and operates a railroad in a public street, it is liable to the owners of property abutting on such street, notwithstanding an ordinance of the municipality, no terms authorized such use of the street for the actual diminution in market value of the property for any use to which it may be reasonably put; occasioned by the construction and operation of the railroad through such street. Denver & R. G. R. Co. *v.* Bourne (Colo.), 16 Pac. Rep. 839. Following Denver Circle R. Co. *v.* Nester, 10 Colo. 403; and City of Denver *v.* Bayer, 7 Colo. 113.

Same—Ownership of Fee.—This right of abutting property-owners to compensation is regardless of the ownership of the fee in the street. City of Denver *v.* Bayer, 7 Colo. 113; Stange *v.* Hill & W. D. St. R. Co., 54 Iowa, 669; Burlington & M. R. R. Co. *v.* Reinhackle, 15 Neb. 279; s. c., 14 Am. & Eng. R. R. Cas. 169; Mollandin *v.* Union Pac. R. Co., 14 Fed. Rep. 394.

Same—Damages.—The abutters upon public streets in cities are entitled to damages sustained by them by reason of a deviation of the street for which it was originally taken, and its appropriation to other and inconsistent uses, such as the building or in operating of a railroad along the line of such street. Florida So. R. Co. *v.* Brown (Fla.), 1 So. Rep. 512; Wabash, St. L. & P. R. Co. *v.* McDougall, 118 Ill. 229; s. c., 27 Am. & Eng. R. R. Cas. 386; Chicago & E. I. R. Co. *v.* Loeb, 118 Ill. 203; s. c., 27 Am. & Eng. R. R. Cas. 415; Terre Haute & L. R. Co. *v.* Bissell, 108 Ind. 113; Stough *v.* Chicago & N. W. R. Co., 71 Iowa, 641; Phipps *v.* Western Md. R. Co., 66 Md. 319; Lahr *v.* Metropolitan Elevated R. Co., 104 N. Y. 268; Story *v.* New York Elevated R. Co., 90 N. Y. 122; s. c., 7 Am. & Eng. R. R. Cas. 593; Jewett *v.* Union Elevated R. Co., 1 N. Y. Supp. 123; Pittsburgh Junction R. Co. *v.* McCutcheon (Pa.), 7 Atl. Rep. 146; Frankle *v.* Jackson, 30 Fed. Rep. 398.

In an action against a railroad company for damages caused by constructing and using railroad tracks in a street, part of which the plaintiff claims to own, a complaint which fails to show that the tracks were constructed and trains run on that part of the street owned by plaintiff, or that the grievances complained of were different from those sustained by the general public, is bad on demurrer. Terre Haute & L. R. Co. *v.* Bissell, 108 Ind. 113. It is said in Rude *v.* City of St. Louis, 93 Mo. 408, that to recover for an injury to property by obstructing a street on which it abuts, the plaintiff must show damages special and peculiar to his own property, and different in kind from those suffered by the public generally; and that this rule is not affected by the Missouri Constitution of 1875, art. 2, § 21, which provides that "private property shall not be taken

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or damaged for public use without compensation." It is said in *Texarkana & N. W. R. Co. v. Goldberg*, 68 Tex. 635, that in an action to recover for damages to a homestead caused by the construction of a railroad along the street in front of it, the plaintiff is not precluded from recovery on the ground that other property-owners in the same locality had also been injured in the same way.

Same—Limitation of Action.—It is said in *Frankle v. Jackson*, 30 Fed. Rep. 398, that in case of injury to property accruing by reason of a railroad laying its tracks in the street on which it abuts, the cause of action accrues against the railroad at the time of its occupation of the street, and is barred like in other causes of action after the lapse of the prescribed number of years from that date, so that for each day's continuance of the occupation a new cause of action does not arise, and changes in the ownership of the railroad company neither revokes the mode nor creates a new cause of action. See *Chicago & E. I. R. Co. v. McAuley*, 121 Ill. 160; *Bizer v. Ottumwa Hydraulic Power Co.*, 70 Iowa, 145.

In Iowa the right of an owner of property abutting on a street to recover damages against a railroad company for the occupation and use of a street for its tracks is dependent upon statute (Iowa Code, sec. 464), and where such damages have not been assessed and paid in the start and action therefor is barred by five years. *Pratt v. Des Moines & N. W. R. Co.*, 72 Iowa, 249. In that state the owners of property abutting on a street in which a railway is constructed, are not debarred from claiming damages by waiting until after the railway has been constructed, notwithstanding the provision of the Iowa Code, sec. 467, forbidding the laying down of any track in a street until after the abutters' damages have been ascertained and paid. *Stough v. Chicago & N. W. R. Co.*, 71 Iowa, 641.

Same—Elevated Railroads.—An elevated steam railroad in the streets of a city, as usually constructed, is a perversion of the use of the street for the purpose originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction without providing due compensation for the injury inflicted upon the property of abutting owners. *Lahr v. Metropolitan R. Co.*, 104 N. Y. 268; *Story v. New York Elevated R. Co.*, 90 N. Y. 122. And the abutting owners on a street may, by bill in equity, restrain the taking of such street for the purpose of an elevated railroad; under an act of the legislature giving permission therefor, where such owner has not been compensated for such taking. *Jewett v. Union Elevated R. Co.*, 1 N. Y. Supp. 123.

It is said in *Drucker v. Manhattan R. Co.*, 106 N. Y. 157; s. c., 30 Am. & Eng. R. R. Cas. 418, that the construction and operation of an elevated road being a trespass as against property-owners, not compensated by reason of the fact that it imposes in the street in which it is erected an unauthorized use, the damages recoverable by such abutters include whatever of injury or inconvenience results to them from the structure itself or is incidental to its use. The smoke and gases and the ashes and cinders from elevated railroads impair the easement of air in an abutting property-owner; the structure itself and the passage of cars abridges his easement of light; and the dropping of oil and water, and the broken columns interfere with his convenience of access, and they are elements of damage even though they be the necessary concomitance of the construction and operation of the road, and not the production of negligence.

Same—Horse-railways in Street.—It is said in *Clark v. Rochester City & B. R. Co.*, 2 N. Y. Supp. 563, that the construction with the consent of the legislature of a surface street railway in a public street for the carriage of passengers, the cars to be drawn by horses, is not such a taking of the property of abutting owners, who have no title to the bed of the street,

for public use as entitles them to compensation. However, if the property-owner has the fee to the centre of the street he will be entitled to damages. See *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404.

Same—Consequential Damages.—A constitution guaranteeing compensation to the owner of property "damaged" by the public use, entitles the owner of the lot abutting on the street to recover damages of a railroad company diminishing the value of a lot by laying tracks and running its trains through the street in front of the lot. *Frankle v. Jackson*, 30 Fed. Rep. 398. And this right to compensation for damages extends to consequential as well as the direct damages sustained by such abutting owner in consequence of the building and operating of a railroad along the line of street. See *Florida So. R. Co. v. Brown (Fla.)*, 1 So. Rep. 512; *Terre Haute & L. R. Co. v. Bissell*, 108 Ind. 113; *Pittsburgh Junction R. Co. v. McCutcheon (Pa.)*, 7 Atl. Rep. 146. Thus, in the construction and operation of an elevated railroad the abutting property-owners are entitled to consequential damages for injury to their easements of light and air, and also for loss of business as well as for property actually taken. *Drucker v. Manhattan R. Co.*, 106 N. Y. 157; s. c., 30 Am. & Eng. R. R. Cas. 418. It is said in *Florida So. R. Co. v. Brown (Fla.)*, 1 So. Rep. 512, that where an owner of real estate abutting on a street of a town or city, is not the owner of the soil to the centre of the street, although he is not entitled, as against the company laying a railroad along said street, by proper authority to recover damages for the appropriation of the soil of the street, or from any incidental injury to his property from noise or smoke or like annoyances, yet he is entitled to the use of the street and may recover damages from any especial injury he may sustain by reason of said railroad track being so laid as to materially abridge or crowd his use of said street, or by any negligence or improper action in operating said railroad.

Same—Measures of Damages.—The abutting owner of property on a street along which a railway track is laid is entitled to damages for a depression of the market or rental value of his premises, and for annoyances to his business or to his family occupation. *Florida So. R. Co. v. Brown (Fla.)*, 1 So. Rep. 512; *Frankle v. Jackson*, 30 Fed. Rep. 398. Railroad companies chartered to run their trains through a street will not be permitted to make the dwelling houses uninhabitable by the operation of its road, without making due compensation to the owners. *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. (14 Stew.), 316; see *Sullivan v. Royer*, 72 Cal. 248; *Humphrey v. Irvin (Pa.)*, 4 Cent. Rep. 685.

In *Denver & R. G. R. Co. v. Bourne (Colo.)*, 16 Pac. Rep. 839, on the trial of an action for damages for the depression in value of plaintiff's property occasioned by the construction and operation of defendant's railway in the street in which plaintiff's property abuts, plaintiff and others against the objection of defendant testified as to the decrease in the rents and rental value of property by reason of the construction of the railroad; but that they did not know its market value before or since the building of said railroad. It was held, that this evidence having been properly qualified by the instructions given was admissible to aid in determining the actual depression of the result and improvement in market value. Following *City of Denver v. Bayer*, 7 Colo. 113.

Same—Elevated Railroads.—It is said in *Tallmage v. Metropolitan Elevated R. Co.*, 2 N. Y. Supp. 130, that in an action for damages to abutting property caused by the construction of an elevated railroad along a street, the measure of damages is the difference between the rental value of such property with and without the railroad, of the date of its building and the commencement of the action, and evidence of the surrounding circumstances, the disastrous effect of the railroad on the street, the depression

of land in the vicinity, and the suspension of building on the street, caused by the railroad, is admissible on the question of damages when such property is unoccupied, and hence has no rental value. But it seems that an abutting property-owner is not entitled to damages resulting from the change in the grade of the street made by an elevated railway under legislative authority, and by agreement entered into with the city officials, where the charter of the city authorizes it to change the grade of its streets but makes no provision for the payment of damages to persons whose property is injured thereby. See *Wilson v. New York C. & H. R. R. Co.*, 2 N. Y. Supp. 65.

Same—Eminent Domain.—Depriving an abutting property-owner of, or materially interfering with his enjoyment of the easement for any public use, not a proper street use, is a taking of his property for public use within the meaning of the Constitution; thus, appropriating a street to use for an ordinary commercial railroad is not a proper use, and whenever such appropriation is made without the consent of the abutting property-owner and without compensation to him, such a railroad is laid and operated along the portion of the street in front of his lot, so as upon that part of the street to cause smoke, dust, cinders, etc., which darken and pollute the air, coming upon the lot from that part of the street, the lot-owner is entitled to recover whatever damages to his lot are thus caused by so laying and operating the railroad. It is said in the case of *Thompson v. Pennsylvania R. Co.* (N. J.), 14 Atl. Rep. 897; following *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. (14 Stew.) 316; s. c., 26 Am. & Eng. R. R. Cas. 559, that the grant to a railroad company of the right to use a public street does not give it any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners.

DALY v. GEORGIA SOUTHERN AND FLORIDA R. CO.

GEORGIA SOUTHERN AND FLORIDA R. CO. v. DALY.

(*Georgia Supreme Court, July 11, 1888.*)

Municipal Corporations—Control of Streets—Granting for Depot Purposes.—Georgia Acts, 1857, page 182, conferring upon municipal corporations power or authority to grant or sanction encroachments on their streets for reasonable compensation in money, does not confer the right or authority to grant to a railroad company a block of land eighty feet wide and four hundred and eighty feet long, in one of the busiest parts of the city, for depot purposes, to the injury of adjoining property-holders.

Same—Dedication—Perverted Use.—Such a grant would not be an "encroachment," but a dedication of the major part of the street for purposes entirely foreign to the purpose for which the street was laid out.

Same—Compensation—Payment "in Money."—The return of ten acres of land formerly donated by the corporation to the railroad company on condition that large encroachments upon its streets shall be granted, is not a compliance with a statute requiring a "fair and reasonable compensation in money."

Same—Grant of License—Power of Corporation.—The usual powers of a general nature in municipal corporations over the streets are not sufficient to confer upon them the right to authorize the appropriation of such street by ordinary railroads.

Same—Fee to Streets—Legislative Grant.—The fee to the streets of Macon is in the state, and they cannot be appropriated to the use of a railroad without a legislative grant.

Eminent Domain—Railway—Application of Streets for Tracks.—The Georgia Southern & Florida R. Co. is not authorized to appropriate streets of Macon set apart for public use by that clause in its charter permitting it to build a railroad from Macon to Homersville, that clause only conferring the privilege of entering the city by condemning its right of way; nor by the provisions of the act transferring to it all the rights and privileges of the Central Railroad & Banking Co.; under the act of February 11, 1850, the latter company is expressly required to compensate in damages the owners of the property through which it may pass.

ERROR from Superior Court, Bibb County. The opinion states the case.

F. J. M. Day, in *pro. per.*, and *Lanier & Anderson*, for Daly.

Guerry & Hall and *Bacon & Rutherford*, for Georgia Southern & Florida R. Co. *et al.*

SIMMONS, J.—*F. J. M. Daly*, as trustee for his wife and children, and as guardian for Mary Dowd, and as a citizen and taxpayer of the city of Macon, filed his bill against the mayor and council of that city, against the Georgia Southern & Florida Railroad, and against the Macon Construction Co., in which he alleged that the mayor and council of the city of Macon had, by an ordinance or resolution, granted unto the railroad company, over the protest of the complainant and other tax-payers and property-holders of the city, an encroachment 80 feet wide and 480 feet long, on Fifth street, said encroachment being opposite the property owned by him as trustee, etc.; and that it would greatly injure and damage his property; that the tenants had given him notice that they would give him up the premises in case said encroachment was granted; and alleged other special damage to him as a property-holder. He also complains that the mayor and council granted the railroad company the right to lay its tracks on said Fifth street, longitudinally, one mile. He alleges that the mayor and council have no power, under the charter of the city, either to grant the encroachment, or to authorize the railroad company to lay its tracks longitudinally on said Fifth street; and that, even if the city had power to grant such encroachment, it could only do so upon a money consideration, having due regard to the rights of property-holders; that five dollars is not such a consideration; nor is the fact that the mayor and council had prior thereto granted the railroad 10 acres of land, and the railroad company had agreed to return it to the city, a sufficient consideration,

Facts.

under the act of 1857. Other allegations are made in the bill as to the mode and manner of granting said privileges by the mayor and council, over the protests of tax-payers and property-owners, it being alleged that several of the aldermen who voted to grant said privileges were disqualified from voting thereon, because of their being stockholders in the Macon Construction Co. and said railroad company. The bill also alleges that the railroad company had never been authorized by the legislature to lay its tracks and run its steam-engines along said Fifth street, and that the mayor and council could not grant, nor could the railroad company accept, such a privilege without special legislative authority. Other allegations are made in regard to the insolvency of the railroad company, and as to the complainant's damages not having been first paid, etc., which, under the view we take of this case, it is unnecessary to notice here. The mayor and council answered the bill, and claimed that they did have authority to grant the encroachment, and to grant the privilege to the railroad company of laying its tracks longitudinally on said Fifth street. The railroad company and the Macon Construction Co. also answered, but it is unnecessary to state the facts set out in their answers. It is also unnecessary to state the evidence contained in the affidavits read before the chancellor. Upon the hearing, the chancellor enjoined the mayor and council from granting the encroachment, and the railroad company from receiving it, and refused to enjoin the railroad company from laying its tracks on Fifth street. To the granting of the injunction the mayor and council excepted, and to the refusal to enjoin the railroad company from laying its tracks upon the street, Daly excepted.

I. We think the chancellor was right in granting the injunction against this so-called encroachment. We do not think that

Grant not an "encroachment"—City had no authority. under the act of 1857 (Acts 1857, p. 182) the mayor and council have the power or authority to grant such an encroachment as this. We do not think that the legislature, when it passed that act, contemplated that the mayor and council would have the right or authority, or would ever claim the right, to grant to a railroad company a block of land 80 feet wide and 480 feet long, in one of the busiest streets of the city. Our idea is that the meaning of the act of 1857 is to allow them to grant small encroachments to property-holders along the whole length of the street, and on both sides thereof, in order to narrow the streets. It was never contemplated that they should have power to grant an encroachment which would jut out 80 feet into the street, and be an obstruction thereon. Such a grant as this was not an encroachment, but a dedication of the major part of the street for purposes entirely foreign to the object for which the street was

laid out; and to allow the erection of a building 80 feet wide and 480 feet long in the street for a passenger and freight depot, would be an obstruction, instead of the encroachment contemplated by the act of 1857. It would obstruct nearly two thirds of the width of the street, and would be a nuisance. "The king cannot license the erection or commission of a nuisance; nor, in this country, can a municipal corporation do so by virtue of any implied or general powers. A building, or other structure of a like nature, erected upon a street without the sanction of the legislature, is a nuisance, and the local corporate authorities of the place cannot give a valid permission thus to occupy streets without express power to this end conferred upon them by charter or statute." 2 Dill. Mun. Corp. § 660. The power given by the legislature is "to permit and sanction encroachments for a reasonable compensation in money, to be paid into the city treasury." Acts 1857, p. 182.

2. If the mayor and council make a donation of 10 acres of land to a railroad corporation, and afterwards the railroad corporation returns the land to the city on condition that large encroachments upon its streets shall be granted to the corporation, is that a compliance with the act of 1857, under which the authority is given to "permit and sanction encroachments for a fair and reasonable compensation in money paid into the city treasury"? Did the legislature intend, when it passed this act, to give the mayor and council power to deal in real estate, by exchanging a portion of its streets for swamp lands? Can the intention of the legislature, when it says "a fair and reasonable compensation in money," be circumvented by first giving away land on the common, and receiving it back in exchange for a portion of its streets? We think not.

Return by
railroad of
donated land.

3. Even if the mayor and council had the power to grant encroachments, we do not think that in this case they had due regard to the interests of property-holders who were affected by their action, as required by the act of 1857. This grant of 80 by 480 feet not only affected the interests of property-holders on the same side of the street, but of property-holders on the opposite side, and affected their interest in such a way as that it would be almost impossible to arrive at a just compensation in damages to such owners. Where the encroachment is granted, it destroys the symmetry of the street, and the continuity of the sidewalk. Persons owning stores and doing business upon that side of the street next to the encroachment would be deprived of all transient custom on the south-west end of the encroachment. The granting of the encroachment would further debar property-holders on the opposite side from obtaining any encroachment

No regard to
interests of
property-own-
ers.

whatever, because an additional encroachment would virtually close the street. It therefore seems to us that the mayor and council, instead of having due regard to the property-holders, showed an absolute disregard of their rights in making this grant.

Counsel for the city and the railroad relied in the argument upon the case of *Kirtland v. Mayor, etc.*, 66 Ga. 385. A careful reading of that case will show that it is not in conflict with the views herein laid down. In that case a small encroachment had been granted by the mayor and council 25 years before, and had been occupied by the parties on both sides of the street for that length of time, Kirtland enjoying this privilege equally with the other parties. The encroachment was small, as we have said, and had been given parties on both sides of the street. Strohecker undertook to build a house upon this encroachment, and Kirtland filed a bill undertaking to enjoin him, not because the mayor and council had no power to grant the encroachment, nor because the encroachment had been granted illegally, but on account of the obstruction of his view. The court denied the injunction, and he afterwards amended his bill and asked for damages for the obstruction to his view; and that was really the case decided in 66 Ga. *supra*. The street, which had existed in that condition for 25 years, and which the public for that length of time had acquiesced in and accepted as the true street, was not in the slightest interfered with. The facts in this case are very different from the facts in that. Instead of a few feet being given, as in that case, here we have the donation of nearly two thirds of the street to build a freight depot; instead of authorizing building upon what had been an inclosure for a quarter of a century, it is proposed to build upon an open and busy thoroughfare. The building is not to go on enclosures acquiesced in by property-holders on both sides of the street for years, but in the middle of the street, in front of the complainant's property, to the damage of the complainant, and over the protest of all parties interested.

4. Taking this view of the case, it is unnecessary for us to pass upon the legality of the action of the city council more than to say that it is improper and illegal for any member of a city council to vote upon any question brought before the council in which he is personally interested. This disposes of the bill of exceptions of the mayor and council and the railroad company. Daly excepted because the chancellor refused to enjoin the railroad company from laying its tracks on and along Fifth street.

5. There are some conflicting decisions in the earlier reports

upon this subject ; but we think the rule is now well settled that a railroad company using steam motors cannot lay its tracks longitudinally upon the streets of a town or city without the sanction of the legislature of the state. Judge Dillon, in his admirable work on Municipal Corporations (volume 2, § 724), in summing up his conclusion upon this subject, "after an examination of all the reported cases upon the subject of railways in streets," says : "As respects ordinary railways operated by steam, and street railways operated by horses, legislative authority is necessary to warrant them to be placed in streets or highways. The legislature may delegate to municipal or local bodies the right to grant or refuse such authority. The usual powers of a general nature in municipal corporations over streets are not sufficient to confer upon them the right to authorize the appropriation of streets by ordinary railroads, whose tracks are constructed in the usual manner and whose trains are propelled by steam." See also the numerous authorities cited by him upon this subject ; also 2 Woods, R. R. Law, § 273 ; Kavanagh v. Railroad Co., 78 Ga. 271 ; s. c., 32 Am. & Eng. R. R. Cas. 269 (decided by this court at October term, 1886) ; Eichels v. Railway Co., 41 Amer. Rep. 561 ; s. c., 5 Am. & Eng. R. R. Cas. 274.

Legislature must consent to use of streets by railroads.

6. It becomes necessary, then, for us to inquire whether the legislature has granted this power to the mayor and council of Macon, or has granted this right to the railroad company. Learned council for the city and for the railroad contended that the general clause in the charter of the city giving it power to control the streets was sufficient to authorize them to grant this privilege to the railroad. We have just seen from the above-quoted authority that this is not sufficient. It must be an express power granted to the city, or one which arises from necessary implication. It is held by Judge Dillon,—and he is sustained by the authorities,—that the general powers given in charters to corporate authorities are not sufficient to authorize them to grant this privilege.

Legislature did not grant power to city.

7. Counsel further contended that this power was granted in the charter of the railroad company—First, that the charter authorized the company to build a railroad from Macon to Homersville ; secondly, that it granted to this company all the rights and privileges of the Central Railroad & Banking Co. They claimed that one of the rights and privileges granted to the Central Railroad & Banking Co. by the act of 1850 was to enter the city of Macon. We have carefully read these charters relied on by the learned counsel, and can find nothing contained in them granting, either expressly or by implication, the right to lay their tracks longitudinally in the streets. Counsel relied upon the

Same not granted in company's charter.

case of *Hazelhurst v. Freeman*, 52 Ga. 244, where this court held that the Macon & Brunswick Railroad, under its charter and the amendments thereto authorizing it to construct a railroad from the city of Brunswick to the city of Macon, and clothing it with the rights, privileges, and immunities of the Central Railroad, was authorized to construct its road into the city of Macon, and was not limited to the city line; and that a private citizen could not enjoin it from appropriating ground for the location of its track because of its want of authority to come within the city lines. We do not doubt the correctness of that decision, nor do we doubt the rights of this railroad company, under its charter, to enter into the city of Macon; but we hold that when it does enter it must enter according to law. It must buy or condemn its right of way, like individuals or other corporations, or it must have authority of the legislature, before it can appropriate streets of the city which have been set apart by the city for the use of the public. The fee to the streets of the city of Macon is in the state. It is therefore eminently proper that the right to use them for any other than the ordinary use of the streets should proceed from the legislature. *District of Columbia v. Railroad Co.*, 114 U. S. 461. The court in the case of *Hazelhurst v. Freeman* does not decide that the Macon & Brunswick Railroad had a right to use the streets of the city in order to go within the city lines; but it simply decided that the company had a right to go within the city lines, and to appropriate property under its charter for the purpose of getting in, and that the court below erred in holding that the railroad company could not appropriate property within the lines under its charter.

8. The legislature not having specifically granted this right to the Georgia, Southern & Florida R. Co. in its charter, to occupy the streets of the city of Macon with its tracks and engines, did it grant the right to the railroad company by giving it all the rights and privileges that the Central Railroad had? Counsel for the railroad company contended that under the act of 1850, authorizing the Central, Macon & Western, and Southwestern Railroads to erect a depot in the city of Macon, the right to lay the tracks and run the engines over the streets is thereby given to this railroad company. We do not agree with him in this contention. We have carefully read this act, and we cannot find therein any right or privilege granted to the Central Railroad and Banking Co. to occupy and use any of the streets in the city of Macon for their tracks and engines. On the contrary, the act of February 11, 1850, expressly provides that they shall pay the owners of the property through which they may pass for whatever damages they may do their

Legislature
did not give
railroad rights
of Central R.

premises, as provided for by the respective charters of the aforesaid companies. Acts, 1849-50, p. 249.

It seems to us that if the legislature had intended to put a new burden or use upon the streets of the city, they would certainly have said so in the act. We are strengthened in this view by the legislative history of the state in regard to street railroads and steam railroads entering the towns and cities thereof. We have examined numerous acts of the legislature in former years; and in all of the acts we have found granting charters to street railroads operated by horses, or ordinary railroads operated by steam, where they enter the streets of a city, the rights to lay down their tracks in the streets is expressly granted. So far as we know, not even a horse-car company has ever attempted to lay its tracks upon the streets of a city in this state without legislative sanction. The law being that a municipal corporation has no power to authorize a railroad company to lay its tracks and use its engines in the streets of the city without such legislative sanction, and there being no legislative grant to authorize the laying of the tracks of this company in the streets of the city of Macon, it follows that the chancellor erred in refusing to enjoin the railroad company from laying its track as complained of in this case. Entertaining these views, we deem it unnecessary to discuss the question of damages, which was so ably and elaborately argued by counsel on both sides. The judgment as to the bill of exceptions of Daly is reversed; and the judgment granting the injunction as against the encroachments is affirmed.

What Amounts to Permission to Use Streets.—See *Kavanagh v. Mobile & G. R. Co.*, 32 Am. & Eng. R. R. Cas. 267, note, 270.

Municipal Corporations—Control of Streets.—Municipal corporations, in their public capacity, possess such powers, and such only, as are expressly granted by statute, and such as may be implied as essential to carry into effect those which are expressly granted. A municipal corporation has not the power, by ordinance, to compel a railroad company to maintain, at a street crossing within the corporate limits, a watchman for the purpose of giving warning to passers-by of the approach of trains. *Ravenna v. Pennsylvania R. Co.*, Ohio St. ; s. c., 10 West. Rep. 463.

The court say: "Power to enact such an ordinance would not be inherent in the council. Except as to incidental powers, such as are essential to the very life of the corporation, the presumption is that the State has granted in clear and unmistakable terms all it has designed to grant at all. Doubtful claims to power are resolved against the corporation. *Cooley Const. Lim.* 233, 234; *Bloom v. Xenia*, 32 Ohio St. 465; *Minturn v. Larue*, 64 U. S. (23 How.) 435; bk. 16, L. ed. 574."

When a statute authorizing a municipal corporation to contract "for the purpose of providing street railroads," and conferring, "for the time which may be agreed upon, the exclusive privilege of using the streets and alleys of such city for such purpose," it is the actual use of the streets for the purpose which confers the exclusive privilege, and the exclusive right to use the same attaches only when the use or its equivalent begins, and

the city has no power under such a grant to devolve on any contractor the duties it owes to the public of determining when and on what streets the public convenience requires a line of road. *Citizens' Street R. Co. v. Jones*, 34 Fed. Rep. 579.

Under the Alabama Code 1876, sec. 1782, the streets of an unincorporated town being under the supervisory control of its municipal authorities, a railroad company can derive no license to construct its road through such streets by virtue of section 1842, conferring upon railroad companies the right to occupy such streets; the provisions of that section apply only to such public works of highways as are under the control of the county commissioner. *Columbia & W. R. Co. v. Witherow*, 82 Ala. 190.

It is said in *Denver Circle R. Co. v. Nestor*, 10 Colo. 403; that the charter of April 7, 1874, of the city of Denver, Colorado, giving to the city council power to control its streets, to regulate the construction and operation of street railways, and the running of locomotive engines and cars, and the location and construction of railroad tracks within the city, does not confer upon the council such authority to license the construction of railroad tracks lengthwise of its streets and throughfares generally, as to charge the purchasers of abutting property with notice that they may be so used by railroad companies for the running of their trains, in common with every other mode of conveyance.

Under Laws N. Y. 1828, c. 141, the defendant corporation was authorized to build a turnpike over certain premises, and by Laws N. Y. 1862, c. 233, it was further authorized to construct railroad tracks along said turnpike. By Laws N. Y. 1870, c. 139, the north boundary of plaintiff's city was extended to include a portion of the turnpike and railroad, and in 1884, by proceedings under its charter, the city acquired title to the premises in question for the purpose of a public street. *Held*, that the city became vested with the control of the premises in question as one of its public streets, and had power to compel the defendant to place its tracks flush with the street, and in such portion of the street as would leave a roadway on each side thereof for the passage of vehicles. *City of Albany v. Watervliet Turnpike & R. Co.*, 108 N. Y. 14; aff'g s. c., 45 Hun (N. Y.), 442.

Same—Perversion of Use of Streets.—As to the right of abutting lot-owners to compensation for injuries resulting from a perversion of the use of streets, see *ante*, *Adams v. Chicago, B. & N. R. Co.*, 7 and note, 16-20.

Unless authorized by some law, in consonance with the provisions of the constitution, use for railroad purposes of the public streets of an incorporated town, presumptively, would be unauthorized by the original dedication, and would *prima facie* be a special damage to the complainant, which could be restrained by injunction at her instance, she being an adjacent property-owner. 1 High, Inj. (2d ed.) §§ 389, 398, *et seq.*; *Perry v. Railroad Co.*, 65 Ala. 400; 2 Dill. Mun. Corp. (3d ed.) §§ 707, 708; *Railroad Co. v. Railroad Co.*, 75 Ala. 275; *Mills, Em. Dom.* §§ 128-130; *Railroad Co. v. Burkett*, 42 Ala. 83; *Columbus & W. R. Co. v. Witherow* (Ala.), 3 So. Rep. 23.

ATCHISON STREET R. CO.

v.

NAVE *et al.**(Kansas Supreme Court, March 10, 1888.)*

Railway in Street—Nuisance—Action to Restrain—Special Injury.—Two or more persons, each owning distinct though adjoining lots and buildings on the street of a city where it is proposed to build a street railroad, without authority from the city, which, when built, will obstruct the use of the properties, and cause a common injury to such proprietors, independent and different from what the general public suffers, may unite as plaintiffs, and maintain an action to restrain the threatened obstruction and nuisance. Following *Palmer v. Waddell*, 22 Kan. 352.

Same—Authority to Occupy Street—Time Limited.—Where a city authorizes a street railway company to occupy a certain street, and construct a railroad thereon, at any time within six months after the authority is granted, the privilege so given must be used, if at all, before the expiration of the time limited.

Same—Permission to Occupy Street Merely License—Revocation.—The permission conferred by the city authorities is a mere license, and, if it is not availed of by the company within the time stated in the ordinance, no act of revocation or declaration of forfeiture is required to terminate the same; and the railway company, or licensee, cannot thereafter construct or operate the road without a renewal of the license.

ERROR to District Court, Atchison County.

Abram Nave, James McCord, and G. L. Moulton instituted an action against the Atchison Street R. Co. to enjoin the construction of a street railroad along Second street, in the city of Atchison, alleging that the plaintiffs had constructed large buildings on that street to be used as wholesale houses, and were adapted to that purpose, and that the construction of the railroad, in the manner threatened, would necessarily obstruct and destroy access to their property and buildings, and would be of irreparable injury and damage to them; and they further aver that they have the same interest in the subject of the action. The railway company demurred to the petition, alleging that there was a defect of parties plaintiff, and that several causes of action were improperly joined; which demurrer was overruled and excepted to. The answer of the railway company admitted the organization and existence of the city of Atchison, and of the defendant railway corporation, as well as the allegation respecting the existence and location of Second street in Atchison. It further admitted that it claimed the right, and was about, to build and maintain a street railway on Second street, as alleged.

The other facts stated in the petition were denied; and the defendant set up as a third defence that the plaintiffs had no mutual or joint interest in the prosecution of the action, and were improperly joined as plaintiffs therein. The reply of the plaintiffs denies all averments inconsistent with those stated in the petition. Afterwards, upon stipulation of all the parties, John K. Landis was substituted as plaintiff instead of G. L. Moulton, it appearing that the property of Moulton had been transferred to Landis. The case was tried by the court without a jury, and the following conclusions of fact and of law were found and stated:

“CONCLUSIONS OF FACT.

“(1) All and each of the allegations contained in the first count of the plaintiffs' petition are true. (2) All and each of the allegations contained in the second count of the plaintiffs' petition are true; but since the commencement of this action, and on July 1, 1884, the plaintiff G. L. Moulton sold and conveyed to John K. Landis the real property described in said petition as belonging to G. L. Moulton, and the said John K. Landis is substituted in his stead by agreement of the parties. (3) Under the ordinance of said city, the width of said Second street subject to use for sidewalks is 12 feet on each side thereof; but the actual width occupied on the east side of said street, including the curbing, is only $11\frac{1}{2}$ feet, and it has never exceeded that width. There is a stone guttering outside of the curb-stone, the depth of the guttering being about one foot from the top of the curb-stone. (4) The east end of the Atchison Union depot is at Second street, extending north to Main street; and the next street north of Main street is Commercial street, block 19 being on the west side, and block 20 being on the east side, of Second street, between main street and Commercial street, each block being 315 feet in length,—the distance between the north side of Main street and the south side of Commercial street. (5) On November 14, 1879, the mayor and councilmen of the said city of Atchison, then a city of the second class, passed an ordinance which was duly approved on the same day, and published on November 15, 1879, granting to the Atchison Union Depot and R. Co., and the Missouri Pacific R. Co., the right to extend, construct, and lay down a single railroad track from the Missouri Pacific railway track, on the south side of Main street, to the north of Main street,—the distance of 175 feet on Second street,—not to exceed 40 feet from the west side of said Second street, with power to said companies to operate the same, the said track to be used for no other purpose than mail, express, and passenger trains. And it was provided in said ordinance that the track should be made to conform to the grade of

the street; and that the street should be macadamized or planked by said companies a distance of 175 feet north of Main street, so as to make said street fit for use; and that cars and engines should not be permitted to stand north of the south line of Main street at any time to exceed twenty minutes, except for necessary laying down or repair of tracks. (6) Such companies duly proceeded to lay said single track on Second street, across Main street and north thereof, the gauge of said track being four feet eight and one-half inches, or five feet from outside to outside of the rails. At a point two or three feet north of the north line of Main street it is seventeen feet and seven inches from the curbing on the west side of Second street to the outside of the west rail; and from the outside of the east rail to the curbing on the east side of Second street the width is thirty-four feet seven inches. At a point thirty-eight feet further north, it is twenty-two feet from the curb-stone on the west side of Second street to the outside of the west rail; and from the outside of the east rail to the curbing on the east side of Second street the width is twenty-nine feet ten inches. At a point forty-eight feet four inches further north and opposite the south wall of the Moulton building, it is twenty-four feet from the curbing on the west side of Second street to the outside of the west rail; and from the outside of the east rail to the curb-stone on the east side of Second street the width is twenty-seven feet seven inches. At a point forty-eight feet further north, to opposite the north side of the Moulton building, it is twenty-four feet from the curb-stone on the west side of the street to the outside of the west rail; and from the outside of the east rail to the curb-stone on the east side of said street the width is twenty-seven feet seven inches. At a point twenty-four feet nine inches still further north, at the end of said curb-stone on the west side of said track, which is opposite to the middle of the front of said Nave and McCord building, it is twenty-three feet and ten inches from the curb-stone on the west-side of said street to the outside of the west rail; and from the outside of the east rail to the curb-stone on the east side of said street the width is twenty-seven feet and seven inches. (7) On December 20, 1881, the mayor and councilmen of said city of Atchison passed, and on December 30, 1881, the mayor approved, and on December 31, 1881, there was duly published, ordinance No. 415, granting to the Atchison Street R. Co., a corporation, the right, at any time within six months after the taking effect of said ordinance, to construct street-car tracks, and operate cars thereon, over, along, and upon certain designated streets of the city of Atchison, commencing on Second street at or near the Union depot, thence north on Second street to Commercial street, thence west on Commercial street to Eighth street, and on cer-

tain other streets of said city,—but the tracks, side tracks, and switches not to be constructed nearer than fifteen feet of any sidewalk, except upon and by permission of the council of said city of Atchison; the gauge to be four feet eight and one-half inches, or five feet from outside to outside of the rails, and the tracks not to be elevated above the surface of the streets, but so that vehicles might easily cross the same; and the cars shall be propelled by horse or mule power. And it was further provided that upon the failure of said street-railway company to construct the track over and along either of the routes mentioned in said ordinance, and operate cars thereon, within six months from the time of the taking effect of said ordinance, the rights conferred thereby should cease and determine, unless such street-railway company should, by an action of law or judicial proceeding, be interrupted in the construction of such track or tracks, and the operation of cars thereon, or should be prevented by injunction, or otherwise, from constructing such track or tracks, and in operating cars thereon; in which case the time of such interruption or prevention should not be deemed or taken as any part of such period of six months. On May 15, 1882, the mayor and councilmen of said city of Atchison passed, and on May 22, 1882, the mayor approved, and on May 23, 1882, there was duly published, ordinance No. 439, extending the time for the completion and operation of the street railway until six months after the taking effect of said last-named ordinance, and providing if said street-railway company should, by an action of law or judicial proceedings, be interrupted or hindered in the construction of said track or tracks, or in operating cars thereon, the time during which such hindrance or interruption continued should not be deemed any part of said period of six months. (8) Said street-railway company did not lay down any street-railway track in Second street, aforesaid, between Commercial street and Main street, nor south of Main street, except about one hundred feet, or less, at and near the intersection of Second street with Commercial street, prior to the commencement of this action, although it was not prevented or hindered in so doing by any judicial or other proceeding; but, at the time of the commencement of this action, said street-railway company was about to proceed to the laying down of its track from Commercial street to Main street, and would have done so if not prevented by injunction. (9) Before the commencement of this action, Second street had been macadamized from Main street to Commercial street, the Atchison Union Depot and R. Co. having furnished the material, and paid for the work, for so doing from Main street to a point 175 feet north thereof, and the city for the remainder of the distance. The grade of the street, as macadamized, was higher than the

top of the rails of the railroad track that had been placed there by said depot company and Missouri Pacific R. Co., so that the rails were covered by the macadam all of the length of the track, except at two or three places where the tops of the rails were slightly exposed. Said railway track was actually used for only a few months, and then only for the accommodation train twice a day,—once in the morning and once in the evening. Afterward the accommodation train started from, and stopped at, St. Joseph; and since that time said track in Second street had never been used. It could be used, however, by clearing the macadam from the surface of the rails, and digging the macadam from the inside of the rails sufficiently to admit of the flanges of the wheels dropping between the rails, and putting in the crossings at the south side of the Union depot,—which crossings have been removed; and the use of said track might again become necessary at any time. (10) Railway coaches are of the width of about ten feet 4 inches to 10 feet 6 inches, so that they extend about two feet nine inches beyond the rails. The street-railway cars extend only about eight inches beyond the rails. The vibration of railway coaches in motion is about eight inches at the floor of the coach, and considerably more at the top of the coach. When passenger, mail, and express trains are operated, it requires about 14 feet on each side of the track to comfortably and safely accommodate the business. (11) The two buildings of plaintiffs', which adjoin each other, were erected with special reference to the carrying on of the wholesale grocery business. The east end, or rear, of the buildings extends to certain railway side-tracks where goods are principally received into the houses, and there is no access to said buildings by wagons from the rear; and the only access by wagons is from the front, or Second street, where most of the goods are taken out, and some goods received. Large transfer-wagons are and have been mostly used, some of the beds thereof having level, and others thereof slanting, surfaces,—the slope being toward the rear of the wagons. The most convenient method to load and unload wagons having the slanting surfaces is to back them up with the hind wheels to the curb-stone, the wagon then standing crosswise of the street. Farm wagons are also frequently used to load and unload, some having movable end gates, so that the most convenient method of loading and unloading is also by backing up. The length of a transfer-wagon is about 20 to 22 feet, and its width, from end to end of axle, about $7\frac{1}{2}$ feet. The transfer-wagons having a fifth wheel can be turned almost at right angles, so as not to occupy much of the street beyond the length of the wagon, though, in turning about, double that distance is required. And farm wagons

not being so constructed, although they are shorter than the transfer-wagons, yet they require as much or more room when standing crosswise of the street. If the wagons were all loaded or unloaded from the sides, which it is possible, although not convenient, to do, only about eight feet of the street outside of the curbing would be absolutely required; but no wagon could pass it, while so standing, without running up on the street-railway track, provided it was not laid further than 15 feet from the sidewalk. (12) If said street-railway track should be laid 15 feet from the sidewalk on the east side of Second street, the distance between the rails of the street-car track and the railroad track would be only 7 feet and seven inches along the whole of the frontage of said two buildings. This would not be sufficient space for the railroad coaches and the street-cars to pass each other in safety, and allow passengers to alight,—allowing no space for the handling of baggage, mail, and express matter on the east side of the railroad track, and between it and the street-car track; and it would be dangerous to the public to allow the street-car track and the railroad track to be so near each other; and with said street-car track as near as 15 feet to the sidewalk on the east side of Second street the business carried on in the plaintiffs' buildings would be seriously interfered with.

“CONCLUSIONS OF LAW.

“(1) The defendant ought not to be allowed to lay down its street-car track between the railway track already there and the east side of Second street. (2) The plaintiffs Abram Nave and James McCord, and also J. K. Landis (substituted for G. L. Moulton), are entitled to a perpetual injunction to restrain the defendant from laying down its track between the railroad track already there and the east side of Second street, opposite the buildings of plaintiffs, so long as such buildings are used for the purposes for which they were erected. (3) The defendant ought to be adjudged to pay the costs of this action.”

The defendant moved for judgment in its favor upon the findings of fact, and also for a new trial; both of which motions were overruled, and judgment was given in favor of the plaintiffs, perpetually enjoining and restraining the defendant from laying down any track, or operating any street railway, on Second street in front of the plaintiffs' property, and also for the costs of the action. The defendant removed the case to the supreme court for review.

Jackson & Royse for plaintiff in error.

W. W. Guthrie for defendant in error.

JOHNSTON, J.—Two principal questions are brought up by

this proceeding, for our consideration and decision. The first relates to the objection of misjoinder, and arises on the order overruling the demurrer alleging that several causes of action, and several parties plaintiff were improperly joined, and also in rendering a single judgment in favor of all the plaintiffs upon what are termed "independent causes of action." It is argued that the obstruction of access to the Nave and McCord building, which was adjoining and north of the Moulton building, in no way affected the use of the latter, and that the threatened nuisance or obstruction to the Moulton building would not have been an interference to the use and enjoyment of the Nave and McCord property. As a general principle, several plaintiffs having distinct and independent causes of action against a defendant cannot unite in a suit for the separate relief of each. The code provides that, where several persons have an interest in the subject of the action, and in obtaining the relief demanded, they may join as plaintiffs. Section 35. And, also, "when the question is one of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Section 38. The threatened injury or nuisance complained of here is one that is common to all the plaintiffs, and all have a general interest in the relief demanded. In fact, the case falls fairly within the decision of *Palmer v. Waddell*, 22 Kan. 352. There the defendant erected an obstruction on a natural water-course, causing the water to overflow and injure the land of the plaintiffs. Although the several plaintiffs were the owners of separate and distinct tracts of land, it was ruled that the overflow was a common injury to all the plaintiffs. And the common interest which they had, authorized them to join in a suit as plaintiffs to restrain the nuisance. The same principle is announced in the case of *Jeffers v. Forbes*, 28 Kan. 179, where it is said that the owners of different tracts of land may unite in a single action to abate a common nuisance.

The next point is that the findings do not sustain the judgment that was rendered; and that depends on whether the plaintiffs would suffer an injury special and peculiar to themselves by the threatened nuisance, and also whether the defendant railway company had any authority or right to construct a railroad in front of their premises. The findings of fact made by the court, which have been stated, and need no repetition, sufficiently show, we think, that the injury resulting from the obstruction of the street is one that is special and peculiar to the plaintiffs below, and independent of and different from the general injury to the public. The railway company, however, had no right to occupy the street or

Objection of
misjoinder.

No authority
to construct
road—Ob-
struction a
nuisance.

construct a railroad on the proposed route. While the fee of the streets is in the county, the control of the same in the interest of the public is placed in the city, and, before street-railways can be built or operated, the privilege must be obtained from the city authorities. *Railway Co. v. Railway Co.*, 31 Kan. 661; 2 Dill. Mun. Corp. § 724. It appears that, in December, 1881, the mayor and council of the city of Atchison, by ordinance, granted to the Atchison Street-railway Co. the right to build on the street in question at any time within six months from the taking effect of the ordinance. It seems that this privilege was not used, and in May, 1882, another ordinance was passed by the mayor and council, authorizing the company to occupy the street and build its railway at any time within six months after the taking effect of that ordinance; and by both ordinances it was provided that, if the company was interrupted or hindered by an action at law or judicial proceedings, the time of such hindrance or interruption should not be deemed a part of the period in which the company was allowed the privilege of constructing its road. The company did not avail itself of the privilege granted by either ordinance, and it was not hindered or prevented from so doing by any judicial or other proceeding. The case, therefore, stands, so far as the road in question is concerned, as if no authority to occupy the street had ever been granted to the company. The contention that the privilege granted by the ordinances remains until a forfeiture is declared, is not sound. The permission conferred by the city council was for a limited time; and when that time expired, the privilege no longer existed. The grant is not an irrevocable, one which continues indefinitely, to be accepted or rejected at the option of the company. The consent of the city council to occupy the street is a mere license; and until the company has availed itself of the license, no contractual obligation or relation arises which requires a judicial declaration of forfeiture. Until the license is accepted and used, no right vests in the railway company, and it may be revoked by the city council; and after the time within which it may be availed of, expires, the license lapses, and no revocation is needed to terminate the same. The railway company, or licensee, cannot thereafter occupy the street or build its road thereon without a new permission from the city authorities. *Railroad Co. v. Railroad Co.*, 63 Tex. 529; 26 Am. & Eng. R. R. Cas. 114; *City of Detroit v. R. Co.*, 37 Mich. 558. As the railway company had no authority whatever to build the proposed road, some of the questions discussed become unimportant so far as this controversy is concerned, and need not be determined here.

The judgment of the district court will be affirmed.
HORTON, C.J. concurring.

VALENTINE, J.—Believing that the first proposition contained in the syllabus and the corresponding portion of the opinion comes clearly within the principles enunciated by a majority of this court in the case of *Palmer v. Waddell*, 22 Kan. 352, I concur, although, as an original proposition, I think it is at least doubtful. As to the remainder of the syllabus and the opinion, I fully concur.

Railway and Street-Nuisance.—The grant to a railway company, of the right to use a public street, does not give such railroad company any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to such owners. *Thompson v. Pennsylvania R. Co.* (N. J.), 14 Atl. Rep. 897. Consequently, a railroad which has simply the right of way through a street, and uses, for the purpose of a terminal yard, a portion of such street, such company will be responsible for a nuisance, public or private, created thereby. *Thompson v. Pennsylvania R. Co.* (N. J.), 14 Atl. Rep. 897; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. (14 Stew.) 316; s. c., 26 Am. & Eng. R. R. Cas. 559. For a railroad company cannot justify the maintenance of a condition of things which directly renders a dwelling-house in the neighborhood unfit for a place of residence, upon the ground that the nuisance necessarily results from the convenient transaction of the company's lawful business. *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. (14 Stew.) 316. It is said, in the case of *Thompson v. Pennsylvania R. Co.* (N. J.), 14 Atl. Rep. 497, that a railroad company cannot justify the use of its tracks in such a way as to create a nuisance, on the ground of adverse user for over 20 years, where an additional track, upon which the acts complained of have been done, was laid within 20 years.

See, generally, as to occupation of streets by railroads constituting nuisance, *Kavanagh v. Mobile*, etc., R. Co., 32 Am. & Eng. R. R. Cas. 267; *Pennsylvania R. Co. v. Angel*, 26 Ib. 559; *Nietzy v. Baltimore & P. R. Co.*, 26 Ib. 553; *Osborne v. Fanning*, 25 Am. & Eng. R. R. Cas. 252; *Smith v. New York & N. E. R. Co.*, 25 Ib. 205; note, 24 Ib. 308; *Uline v. New York*, etc., R. Co., 23 Ib. 3; *North Chicago C. R. Co. v. Lake View*, 11 Ib. 42; *Randall v. Jacksonville St. R. Co.*, 17 Ib. 184; *Northern Cent. R. Co. v. Commonwealth*, 5 Ib. 318; *Cincinnati So. R. Co. v. Commonwealth*, 7 Ib. 91; *People v. New York*, etc., R. Co., 10 Ib. 230; *Grand Rapids*, etc., R. Co. v. *Heisel*, 10 Ib. 260; *State v. Louisville*, etc., R. Co., 10 Ib. 286.

Same—Action by Private Person.—However, in such case, a private person cannot, without showing some damage special and peculiar to himself, recover damages therefor. See *Marine v. Graham*, 67 Cal. 130; *Ditch Co. v. Anderson*, 8 Colo. 131; *Sohn v. Cambern*, 106 Ind. 302; *Brant v. Plumer*, 64 Iowa, 33; *Rude v. City of St. Louis*, 93 Mo. 408. *Goodsell v. Fleming*, 59 Wis. 52. It has been said, in the case of *Hogan v. Central Pac. R. Co.*, 71 Cal. 83, that, when other residents of a street suffer equally in kind with an abutting lot-owner by reason of the obstruction or nuisance in the street, and no special damage results to him from such public nuisance, he cannot maintain an action for damages therefor. And in *San Jose Ranch Co. v. Brooks* (Cal.), 16 Pac. Rep. 250, that one damaged in the same manner, though possibly more than the general public, does not sustain such special injury as will entitle him to maintain an action for damages. But it was said, by the supreme court of Texas, in the case of *Texarkana & N. W. R. Co. v. Goldberg*, 68 Tex. 635, that, in an action to recover damages to a homestead, caused by the construction of a railway in front of it, that the plaintiff was not precluded from recovery on the ground that other property-owners in the same locality had also been injured in the same manner.

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As to what are such special damages as will entitle a party to maintain an action in such cases, see *Woodruff v. Mining Co.*, 8 Fed. Rep. 753; *Crescent Mill & Trans. Co. v. Hayes* (Cal.), 8 Pac. Rep. 692; *Shirley v. Bishop*, 67 Cal. 543; *Teubner v. California Street R. Co.*, 66 Cal. 171; *Learned v. Castile*, 65 Cal. 334; *Wheeler v. Bedford*, 54 Conn. 244; *De Vaughn v. Minor*, 77 Ga. 809; *Palmer v. Logansport & R. C. G. R. Co.*, 108 Ind. 137; *Brant v. Plumer*, 64 Iowa, 33; *Bushnell v. Robeson*, 62 Iowa, 540; *Cain v. Chicago, R. I. R. Co.*, 54 Iowa, 255; *Wilder v. DeCou* (Minn.), 1 N. W. Rep. 48; *Ofstie v. Kelly*, 33 Minn. 440; *Bott v. Pratt*, 33 Minn. 323; *Brakken v. Minneapolis & St. L. R. Co.*, 28 Minn. 41; *Dubach v. Hannibal & St. J. R. Co.*, 89 Mo. 483; *Bronnie v. New York & N. J. Tel. Co.*, 42 N. J. Eq. (15 Stew.) 141; *McDonald v. Mayor of the City of Newark*, 42 N. J. Eq. (15 Stew.) 136; *Hatch v. Walamet Bridge Co.*, 6 Fed. Rep. 326; *Larson v. Furlong*, 63 Wis. 323; *Stadler v. Grieben*, 61 Wis. 500; *Pennoyer v. Allen*, 56 Wis. 502; *Snyder v. Cabell*, 29 W. Va. 48.

FORMAN

v.

NEW ORLEANS AND CARROLLTON R. CO.

(*Louisiana Supreme Court, April 16, 1888.*)

Railway in Streets—Power of New Orleans to Grant Franchises to—Regulation of Fares.—Under the constitution and laws of the state of Louisiana the city of New Orleans is clothed with full and exclusive power to grant franchises for the construction and operation of passenger street railways, by steam or horse power, within her corporate limits, including the right of regulating the rates of fare to be enacted by said corporations for the transportation of passengers.

Same—Judicial Control.—The city's discretion in regulating such matters is not subject to judicial control or interference, unless arbitrarily or unlawfully exercised.

Same—Regulation of Rates—Discrimination.—That feature of the contract between the city and the New Orleans & Carrollton R. Co. which exacts from the public a fare of ten cents from Carrollton to Canal street, except from actual residents above Napoleon avenue, who can, on certain conditions, make the trip for five cents, is not subject to attack as an unreasonable discrimination prohibited by the law governing the obligations of common carriers.

APPEAL from Civil District Court, Parish of Orleans.

Plaintiff, B. R. Forman, institutes this action against the New Orleans & Carrollton R. Co. for \$5000 damages for an alleged ejectment from one of defendant's cars. Judgment for defendant. Plaintiff appeals.

E. Howard McCaleb and *Wm. F. Mellen* for appellant,
John M. Bonner for appellee.

POCHÉ, J.—Plaintiff complains that he was illegally ejected from one of defendant's cars, for which he claims damages in the sum of \$5000; and he prosecutes this appeal from a judgment which rejected his demand. The following are the salient facts in the case: The contract under which the defendant obtained its present franchise was framed under the provisions of two ordinances of the city council of New Orleans, which contained the specifications under which the right of way was to be sold to the company, among which was the following: "Fare. The rates of fare from Canal street to the head of Jackson street and the Napoleon avenue station, and points between, shall be five (5) cents, and five (5) cents beyond Napoleon avenue station, between the hours of 4 A.M. and 12.30 P.M., except to actual residents above Napoleon avenue, who shall have the privilege of purchasing through tickets at the rate of ten for fifty cents. The fare between 12.30 P.M. and 4 A.M. to be charged shall be ten (10) cents to Napoleon avenue, and ten (10) cents from there to Carrollton." In compliance with that stipulation, the company procured tickets in bunches of 10 each, which it has been selling exclusively—at least knowingly—to actual residents above Napoleon avenue; designed as explained in the opinion of this court in the case of *De Lucas v. Railroad Co.*, 38 La. Ann. 931. It appears that plaintiff, who does not reside above Napoleon avenue, obtained a bunch of such tickets from a person who was an actual resident above that street, and attempted to ride on one of those tickets from the corner of Second and St. Charles streets to Carrollton. At Napoleon avenue, where the change of cars is effected, he tendered for his fare thence to Carrollton one of the coupons of the tickets in question, which was refused by the collector, on the ground, as acknowledged by plaintiff, that he was not a resident above that avenue. Being called upon to pay the regular fare, and persisting in his claim to pay the same by means of the ticket, plaintiff was ejected from the car. It appears that on two previous occasions plaintiff had tendered similar tickets for his fare at the same point, which had been refused; but that, in order to avoid an unpleasant contestation, the employee of the company had himself paid plaintiff's fare in currency, as required by the rules of the company.

The crucial point in the case is the contested right of the company to make the discrimination hereinabove described in favor of actual residents above Napoleon avenue, which is alleged to be unjust, unreasonable, and violative of the legal obligations of the defendant company as a common carrier. Hence the main relief claimed by plaintiff is a decree condemning the defendant to sell to him, and other persons residing below Napoleon avenue,

Facts.

Right of company to make discrimination.

tickets on the same terms and conditions which are extended to actual residents above Napoleon avenue. It appears, as above stated, that the discrimination complained of does not emanate from the railroad company, but that it was imposed on it as a condition of its franchise by the city. The leading feature of that stipulation is a limit of the maximum rate which the company can exact for fare between the points therein designated.

Under its requirement the company cannot obtain a higher rate than ten cents between Canal street and Carrollton, or five cents between Carrollton and Napoleon avenue, and between Canal street and Napoleon avenue, or the foot of Jackson street and intervening points. It is shown that during the existence of a previous corporation which operated a road on the same street, between Carrollton and "Lee Circle," several blocks above Canal street, the rate of fare was 25 cents each way. Hence the complaint is not that the rate which is charged to plaintiff, and to the public in general, is excessive or unreasonable, but the contention is that plaintiff, and all persons who do not reside in this city above Napoleon avenue, are placed at a disadvantage in comparison with actual residents above that avenue.

Under our law touching the powers of the city of New Orleans, as expounded in jurisprudence, it clearly appears, and it is not even disputed, that the city is clothed with the full and exclusive power of granting franchises for the construction, operation, and running of railroads over its streets, as well as the power of fixing a tariff of rates to be enacted by all such corporations.

Act No. 20 of 1882, which was the city charter then in force, gives to the council the power "to authorize the use of the streets for horse and steam railroads, and to regulate the same; to require and compel all lines of railway or tramway to use any one street, to run on the same track and turn-table, to compel them to keep conductors on their cars," etc. *Brown v. Duplessis*, 14 La. Ann. 842; *Board v. New Orleans*, 32 La. Ann. 917; *Harrison v. Railway Co.*, 34 La. Ann. 462; *Tilton v. Railroad Co.*, 35 La. Ann. 1068; *Railroad Co. v. New Orleans*, 39 La. Ann. 709. But, conceding all these powers to the city of New Orleans, plaintiff contests the right of the city to make the discrimination complained of. That argument suggests the question of the right of the judiciary to interfere with the discretion of the city in dealing with matters which the laws of the state have placed within its exclusive control and management.

Right of courts to interfere with discretion of city.

The question came up in the case of *Watson v. Turnbull*, 34 La. Ann. 856, in which the court, after a full review of all previous authorities bearing on the point, said: "Within the corporate limits, the city of New Orleans, under her charter, and under the general law, has

the right to control, manage, and administer the use of the river banks for the public convenience and utility; to establish wharves and landings; to erect works and provide facilities for the use of vessels and water-craft; and to charge just compensation for the use thereof. Riparian proprietors have no right to appropriate to their exclusive use these banks, and they have no private property in the use thereof, which is public. The discretion of the city authorities in determining what are proper and needed facilities for commerce, and on what part of the river bank, within her limits, they should be established, is manifestly not a subject for judicial control or interference." The views of that opinion, which are supported by numerous previous adjudications, were reaffirmed in the cases of *Pickles v. Dock Co.*, 38 La. Ann. 412, and *Villavase v. Barthet*, 39 La. Ann. 247, 1 South Rep. 599. Plaintiff's argument, that the question must be tested under the general law governing and determining the obligations of common carriers, is grounded on the provisions of article 244 of the constitution, which reads: "Railways heretofore constructed, or that may hereafter be constructed, in this state, are hereby declared public highways, and railroad companies common carriers." Without deciding that street-railroad companies are not common or public carriers, in the general sense of the term, we feel very certain that they were not within the contemplation of the convention in adopting that article. As streets of a city are, and have at all times been, known to be public highways, it cannot be supposed that because railroad tracks were laid thereon it required a constitutional declaration to the effect that they were public highways. But, construing that article in connection with articles 243, 245, and 246 of the same constitution, it is manifest that the article was not intended to have the slightest reference to street railways, and that as to them the municipal power to regulate, manage, and control their construction and operation was not intended to be affected, altered, or modified by any provision of the constitution. Article 243 recognizes the general power of building railroads in the state, and of connecting them with railroads of other states; and regulates the manner of one road intersecting another, and of transporting each other's passengers, etc., without delay or discrimination. Article 245 requires all railroad corporations doing business in this state to have and maintain public offices in the state for the transfer of stock, and for the transaction of other dealings connected with their stock. It requires no argument to show that in all these references to railroad corporations the convention did not intend to include street railroads. But the intention to leave the subject-matter to the municipal authorities, to which they had always been relegated, is removed beyond the

Street rail-
ways not com-
mon carriers.

domain of discussion by article 46, which provides : " The general assembly shall not pass any local or special law on the following specified objects: . . . Authorizing the construction of street passenger railroads in any incorporated town or city."

Now, as no legislation has yet been enacted in furtherance of any of the articles above referred to, so as to subject street railroads to the same rules, it is absolutely safe to conclude that nothing therein contained can fairly be construed as impairing the exclusive control of the

city of New Orleans over all the street railroads heretofore constructed or that may hereafter be constructed within her limits, and that such power includes the right of fixing the tariff of fares to be charged for the transportation of passengers. No one is heard to complain of the act of the city in fixing the maximum rate which can be charged for fare on all the street railroads, including the defendant, which are now under operation in the city. The complaint would be as fruitless as is that of plaintiff in the present controversy. It is an undeniable proposition that the authority of the city council in the premises is as effectual and binding as would be a similar provision emanating from the legislature itself.

Now, in our examination of the numerous authorities quoted by counsel, and in which unreasonable discriminations made by common carriers were rebuked and avoided, we find that none of the acts complained of had any direct or indirect legislative authority, but that, on the contrary, they antagonized either the general or common law governing the obligations of common carriers, or some special law applicable to the subject-matter. The regulation which is here charged to be an unreasonable discrimination, far from being violative of a special law, is directly sanctioned by legislative authority. More than that, it is embodied in, and forms part of, a solemn authentic contract between the city and the defendant company. And the court is urged to cancel and abrogate a contract which the city had the undisputed power to make, and in a proceeding in which she is not even a party. According to the contract the established rate of charges for all persons is 10 cents between Canal street and Carrollton, each way ; the exception being in favor of actual residents above Napoleon avenue. Hence it follows that if any unreasonable discrimination can be charged to the scheme it must be attributed to the exception, and not to the general rule ; and therefore the judgment rendered could not benefit plaintiff, but would materially injure a class of people which the city intended to protect. It was unquestionably within the discretionary power of the city counsel in regulating the defendant's road to consider that, as the commercial centre of the city, the great majority

Right of city
to fix tariff of
fares.

Rate estab-
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city.

of churches, schools, banks, courts, and other institutions were clustered in the neighborhood of the centre of the city, and almost all below Napoleon avenue, it was simply an act of justice to actual residents above Napoleon avenue, in the pursuit of their daily avocations, and for other equally necessary purposes, to enable them to reach the central portion of the city with the same facilities, and at the same cost, which were afforded to all other residents of the city.

It is settled in jurisprudence that all discriminations are not unjust, unreasonable, or oppressive, and that they are therefore not all reprehensible. In the case of *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 311, cited by plaintiff, it was said: "But what an unjust and unreasonable discrimination? No rule can be formulated to apply to every case that may arise. It may, however, be said that it is only when the discrimination inures to the undue advantage of one man in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination may be indulged in." A similar distinction is made in another case cited by plaintiff, wherein the court said: "The common and equal right is to reasonable service for a reasonable compensation. Neither the service nor the price is necessarily unreasonable because it is unequal. The question is not merely whether the service or price is absolutely unequal, in the narrowest sense, but also whether the inequality is unreasonable and injurious. . . . This question may be made unnecessarily difficult by an indefiniteness, confusion, and obscurity of ideas that may arise when the public duty of a common carrier, and the correlative common right to his reasonable service for a reasonable price, are not clearly and broadly distinguished from a matter of private charity. If A. receives, as a charity, transportation service without price, or for less than a reasonable price, from B., who is a common carrier, A. does not receive it as his enjoyment of the common right; B. does not give it as a performance of his public duty; C., who is required to pay a reasonable price for a reasonable service; is not injured, and the public, supplied with reasonable facilities and accommodations on reasonable terms, cannot complain that B. is violating his public duty. There is, in such a case, no discrimination, reasonable or unreasonable, in that reasonable service for a reasonable price (is given) which is the common right." *McDuffee v. Railroad Co.*, 52 N. H. 451, 452. See also *Shipper v. Railroad Co.*, 47 Pa. St. 340; *Shivary v. Gas-Light Co.*, 1 R. & Corp. Law, J. 339; 1 Wood, R. Law, p. 565, § 197. So, in this case, if we subject the act of the city to the test of the general law on the subject of discriminations, as though she herself owned and operated the road, we find that plaintiff and all other persons have a reasonable

All discriminations not unjust—Reasonable rate.

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service at an avowedly reasonable price, and that the difference made in favor of actual residents above Napoleon avenue is simply an act of liberality, resting on a sense of justice and fair play to a class of people who are all treated alike in the matter of that service, and who would in default of that exception, be placed at a great disadvantage from all other residents of the city. Hence we conclude that, under these circumstances, the public cannot complain, and that plaintiff's action cannot be maintained.

Judgment affirmed.

Common Law Rule as to Discrimination.—See note, 35 Am. & Eng. R. R. Cas. 528.

CORPORATION OF THE CITY OF TORONTO

v.

TORONTO STREET R. CO.

(15 Ont. App. Rep. 30.)

Street Railways—Agreement as to Operating—By-law—Ultra Vires.—In 1861 an agreement was entered into between the plaintiffs and certain parties for the construction and operation of street railways in the city of Toronto, in which they agreed to construct the lines of road specified from time to time, and that they would at all times employ careful, sober and civil agents, conductors, and drivers to take charge of the cars upon the said railways, and that they and their agents, conductors, drivers, and servants would at all times . . . operate the said railway, and cause the same to be worked under such regulations as the common council of the city of Toronto might deem necessary and requisite for the protection of the persons and property of the public, and provided such regulations should not infringe upon the privileges granted by the agreement. Subsequently the privileges so conferred upon those persons were assigned to the defendants who continued to work several railways, and after some years introduced for use thereon smaller cars, drawn by one instead of two horses, as had been done previously, and with only one man in charge instead of two as on the larger cars. In 1852 the council of the city passed a by-law (No. 1264) prohibiting the operation of any cars within the city limits without two men in charge, one as driver, the other as conductor. The defendants refused to conform to this by-law, and this action was brought to compel them to do so, the agreement of 1861 being relied on as warranting that relief. *Held*, (1) that the by-law in question was not within the terms of the agreement, and that it was therefore *ultra vires*. (2) That the by-law was also invalid, as it was an invasion of the domestic concerns of the company. Osler, J.A., dissenting.

THIS was an appeal by the defendants from the judgment of Boyd, C., pronounced on the 20th November, 1886, whereby

the defendants were restrained from using cars upon the lines of railway operated by them in the city of Toronto, without having a conductor as well as a driver upon each and every car.

The statement of claim filed in May, 1886, set forth at considerable length an agreement entered into by the city of Toronto with one Alexander Easton for the construction of street railways along certain streets in the city, and the passing of an act of the Parliament of Canada in May, 1861, incorporating the said Easton and others as "The Toronto Street R. Co.;" and that by certain proceedings thereafter taken the charter became vested in the present defendants.

The statement further set forth that: "On the 18th day of December, 1882, by a certain by-law of the plaintiffs entitled 'By-law number 1264 respecting street railways,' it was . . . enacted, among other things, by the plaintiffs, that from and after the passing of that by-law every street railway car in use on the several lines of street railway in the city of Toronto shall be provided and furnished not only with a driver, but also with a conductor, who should discharge his duties as such conductor in the manner provided by by-law number 353 . . . and that it should not be lawful for any person or persons, or body corporate, to use or operate any street railway in the city of Toronto with cars not having both conductors and drivers thereon when such cars were in use on the streets of the said city; but notwithstanding the said by-law number 1264 and repeated remonstrances of the plaintiffs, and notwithstanding the contracts and obligations under the said other by-laws, agreements, and statutes, the defendants still persist in using and operating their street railways with cars not having conductors thereon as well as drivers, to the great detriment of the public and contrary to their express obligations to the plaintiffs."

The plaintiffs therefore asked that the agreements above referred to might be specifically enforced as against the defendants; payment of \$5000 as damages resulting from the breach by the defendants of their said agreements and covenants; an injunction ordering and restraining the defendants, their servants, workmen, and agents using or operating any cars upon their lines of street railway in the city of Toronto without having conductors as well as drivers.

The defendants set up, among other defences, that the by-law of the plaintiffs of the 18th of December, 1882, was *ultra vires* of the plaintiffs and that the plaintiffs had no power or authority under the statutes in the statement of claim mentioned or otherwise to enact the same: that the provisions made by the said by-law were not in anywise necessary or requisite for the protection of the citizens of Toronto, or of the persons

or property of the public, and that the said by-law was passed *mala fide* and ought not in equity and good conscience to be enforced.

The case having been put at issue came on before the chancellor on the 12th of November, 1886, when evidence was taken for several days, and on the 20th November judgment was pronounced as above.

McCarthy, Q.C., and Shepley for appellants.

Robinson, Q.C., H. O'Brien, and Lefroy for respondents.

HAGARTY, C.J. O.—It is not necessary to set out the clauses in the original agreement, the statute and the by-law of 1861, and the other documents, as they are fully noticed in the judgment of my brother Patterson.

I am unable to accept the view that under the terms of the agreement of 1861, the presence of a conductor as well as a driver is required on each car. As I understood the argument before the learned chancellor, it was in substance that under the clause in the agreement authorizing the making of regulations by the city, the regulation or requirement of this by-law was justifiable. If the right construction of the agreement require a conductor in all cases besides the driver, there is nothing further to be argued, and the by-law or resolution, whatever it be called, was an unnecessary proceeding. If the decision rest merely on the wording of the agreement, then, I am sorry to say that I have to a great extent misunderstood the substantial argument of the able counsel for the city.

Presented in this shape, we have only to look at the agreement and the original by-law of 1861, and on the two clauses—one that the company shall employ careful, sober and civil agents, conductors, and drivers to take charge of the cars; and the clause: "The conductors shall announce to the passengers the names of the streets, etc., as the cars reach them."

Do these words necessarily import a specific contract that on every car there must be a conductor as well as a driver? Is such a contract so clear and definite that it would be enforced by injunction?

The first clause, as I read it, means that the persons acting as agents, conductors, or drivers shall be careful, sober, and civil, and the second, that an officer or servant acting as conductor shall announce the names of the streets.

The learned chancellor says: "The broad question, which, of course, lies at the root of everything, . . . the validity of this by-law." Again, "It cannot be said that this by-law dealing

Agreement of
1861—Con-
ductors not re-
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Agreement
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by-law consid-
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with the conductors is one which infringes upon the privileges granted by the resolution. It merely makes distinct that which would be rather a matter of inference in the original agreement. It makes distinct in the changed condition, etc., which arose afterwards when one-horse cars were put on. If the circumstances are such as to give rise to the necessity of exercising the power given by the statute, the council can pass rules as they see best; can pass by-laws from time to time, to protect the persons and property of the public;" and at the conclusion of his judgment he says, that the action is the *bona fide* action of the city council upon a by-law which seems to him to be within the power of the council, passed to give protection to passengers and the public.

The formal judgment of the court declares that plaintiffs are entitled to specific performance of the agreement of March, 1861. This formal judgment makes no reference to the by-law, but rests the right upon the original contract.

In this view, apart from the by-law or regulation, a very serious question arises whether the agreement is so definite and precise and clear in its terms that any court of equity would interfere by injunction. I speak with due caution in expressing a clear opinion on such a point, but I am bound to say that I do not think such an interference by the strong arm of injunction would be granted. Viewing the case solely as one of contract in 1861, many important questions would be capable of being pressed with far greater force than they would be with the additional introduction of the by-law. I mean the long standing by or apparent acquiescence on the part of the city during the years that elapsed from the first use of the one-horse cars, and the universal knowledge of every one in the city, that the extensions were being made on the principle of the less costly car system. It may be argued for the city that whenever police regulations become requisite from increase of population or other altered circumstances, no argument should avail as to acquiescence in a line of conduct on the company's part; but if the case be rested wholly on the construction of a contract made over twenty-five years ago, it seems to me that the very gravest grounds exist against the exercise of the drastic remedy of injunction or mandamus.

Remedy by injunction or mandamus.

I am of opinion that the plaintiff's right to succeed in this appeal cannot be supported wholly on the basis of the terms of the original agreement.

It may be, of course, properly resorted to to explain and support the by-law of 1882, but I cannot think it is available by itself to support the decree.

We have to consider that the by-law of 1882, whether it be considered as a by-law or regulation requiring the company to have on every car a conductor in addition to the driver, is within the power of the city council to force upon the company, either under their contract with the company or under their general corporate powers.

It is beyond all question, on the evidence, that its enforcement must have a most serious effect on the value of the franchises of the company in forcing on them a very large extra expenditure.

It seems to me to be also very clear, on the evidence, that it was on the urgency of the city council that about 1873-4, and on the threats of chartering other companies, that the defendants were induced to lay down a series of extensions, and to continue doing so from time to time over routes in the less populous parts of the city, which, unless worked on economical principles, could not prove remunerative—that the one-horse car was well known to be the vehicle adopted by the company over these extensions—that they adopted it, and after it had been in use from year to year, the city again urged further extensions, which, on their urgency and on the known alternative, were made to be worked in the same way; and then, after the lapse of eight years' user, the by-law complained of was passed, to force them to have two instead of one man to manage these one-horse cars.

It appears to me that this interference by the city can only be warranted if it fall under the head of a police regulation, such a municipality in the exercise of its ordinary right to watch over the safety of the people, may exercise. The right to legislate "for the protection of the person and property of the public," is not usually exercised by directing the employment or prescribing the functions of a larger number of servants of a public company, or of a particular manufactory, or in the prosecution of any trade or business.

Such matters as the rate of speed, the carrying of lights at night, the placing of a number, of the owner's name on all vehicles—street cars, the licensing, the width of tires, provisions for the protection of the roadway or track, the taking of certain precautions at crowded spots or crossings, the prevention of the street being obstructed or blocked by unnecessary stoppage or accumulation of street cars; these and all such cognate matters may be conceded as falling generally within the corporation's general right to make and enforce police regulations.

But as soon as the attempt is made to prescribe the number of horses to be used with each carriage, or the number of servants

Power of city
to enforce on
company by-
law of 1882.

Same—Inter-
ference as po-
lice regulation.

who must be employed to drive or conduct the same, we are confronted with a very serious question as to jurisdiction over such matters.

The learned chancellor in resting his view of the case, chiefly on the contract, says: "It is very important to observe that the regulations are such as the city of Toronto may deem necessary. The railway is not to judge, but the city. The council are to judge as to what is necessary and requisite for the protection of the persons and property of the public."

I feel great difficulty in accepting the proposition in the extensive sense in which it is thus enunciated. If it be sound, it of course places the defendants' company wholly within the power of the city, and can be used to turn an enterprise fairly remunerative into a positive loss. Under this view the city could, with an equal "show of reason," insist on an extra conductor to guard the safety of the passengers and public while the ordinary conductor was employed collecting the fares, thus having three instead of two men employed.

It seems to be conceded in the American cases that the court has always to consider whether an exercise of municipal authority as to companies, either chartered by the state or authorized by the local authorities, is reasonable.

The judgment of the supreme court of U. S. in 1877 (*Railroad v. City of Richmond*, 6 Otto, 96 U. S. 527), delivered by the late Chief Justice Waite, discusses the general question. The court below had finally settled the reasonableness of the city ordinances, the only question for the supreme tribunal was that of jurisdiction. *Frankford v. City of Philadelphia*, 58 Penn. State. Rep. 119, shows that a company chartered to carry passengers through a city was not necessarily exempted from liability to municipal regulations, and that a reasonable regulation of the use of a privilege is not a denial of the right, and the right to question its reasonableness is conceded. The general subject and the nature of "police powers" are discussed in 1 Dillon *Municipal Corporations*, secs. 390 to 407.

American cases.

I have seen no case in which a general right to interfere in the internal economy of a trading corporation—regulating the numbers of servants they must employ, has been exercised. There is a case in New Jersey, 12 Vroom, 127, in which the municipality having express power given them by the legislature, were upheld in ordering a railway company to place a flagman.

In *Toledo R. W. Co. v. Jacksonville*, 67 Ill. 37, the municipality directed a flagman to be kept by the railway company at a particular crossing. The court held it unreasonable on the evidence at that particular crossing, as it did not require it, but they recognize the right to so direct at a place where the public safety

required it—that if they could order it at that place when the court held it unnecessary, the company might be compelled to keep a flagman at every road and street crossing of its entire line.

The *Brooklyn Co. v. City of Brooklyn*, 44 S. C. N. Y. 413, is the nearest in its facts. The court was strongly of opinion that a by-law requiring a conductor as well as a driver on each street car could not be supported. I refer to the reasons assigned, “there is a wide distinction between regulating the use of the public streets and entering into the management of the private business of those who have occasion to use them.”

It was said, as to the power given by the charter of the city to regulate common carriers and carriers of passengers: “It would seem to be plain that where the legislature had granted power to the company to run cars in the manner it should deem best, that the city under the power of regulating common carriers of passengers could not provide for the number of the employees on each car or the number of horses it should use.”

Barnard, P.J., p. 414, notices that by the existing law, “the construction, maintenance and operation of the road is made subject to all laws of the city for the regulation of horse railroads generally,” and he adds, “I do not think this power sufficient to legalize an ordinance requiring a conductor on the cars as well as a driver.”

It is also noticed that under the general municipal law such a by-law must be general in its application, not confined to the one carrier company.

All this seems to throw the city back to rest wholly on their contract.

I am wholly unable to view this case in the aspect in which it has presented itself to the learned chancellor.

I agree in the opinion of my learned brother Patterson, whose judgment I have had the benefit of perusal, that this by-law or regulation cannot be supported as properly within the contract between the parties, and that if within the power of the city to enact, it must be as in the nature of a police regulation—under the general authority of

the corporation—and it ought generally to be of common application, and not aimed specially at a particular company or a particular manufactory, or a particular carrier of passengers or goods. I am not, however, judging it wholly on any narrow ground. We are often called upon to consider whether a by-law of a municipality is within their chartered powers, or is reasonable in its nature or provisions, that it is in general restraint of trade, that it is partial in its operation, not general in its application, granting unfair preference or privilege, etc., etc. See such cases as *Calder*

By-law not
within power
of city.

Navigation Co. v. Pilling, 14 M. & W. 86, and cases cited in last ed. of our Municipal Manual in notes 215 and 216.

If I have the right to judge of the reasonableness of this by-law, I do not hesitate to express my opinion as being against it, and as I read the evidence, no case was made out to warrant its enactment.

In *Elwood v. Bullock*, 6 Q. B. 401, Sir J. Coleridge says: "Whether a by-law is for the regulation of trade or for purposes of police, it must be reasonable and just."

The use of these single horse cars is shown to have been for years common in the large cities on this continent, and we can hardly suppose that the intelligent members of the municipality did not share the knowledge of their use common to the rest of the world.

Then we find, as already noticed, their introduction and user for so many years before any suggestion of interference by the city. All this calls for a very strict construction of the right of interference.

The bulk of the evidence as to the existence of a danger to the public calling for this interference, appears to me to be wholly a matter of opinion, on which the whole adult population of Toronto might be asked to express his or her views.

The evidence of fact seems to me to fall short of proving any case against these cars of any general danger to the public, peculiar to them, and not common to every vehicle or conveyance in which one person only has to attend to his horse as well as to goods or passengers received, carried, or delivered by him.

In theory it may be considered that in all cases whether of cabs, omnibuses, loaded wagons, or street cars, the employment of an extra person specially to look after and guard against accidents to passengers or the public, may afford additional protection. We have to deal, however, with realities, not theories, and with the well-understood conditions on which the business of life is carried on.

I am of opinion that no case was made out for the interference of the court, and that the appeal must be allowed, and the action dismissed.

BURTON, J. A.—I quite agree with the learned chancellor that the clauses of the agreement of the 26th March, 1861, are to be read as constituting not only the contract between the parties, but also as defining the powers which are entrusted by the legislature to the city council, and we are relieved from the difficulty of considering the validity of the by-law *qua* by-law or legislation, inasmuch as the defendants

Question presented.

waive any question of that kind and are willing to treat it as a regulation, and the question therefore is reduced to whether this is a regulation which the council are empowered to make under the agreement.

At the time that agreement was made, there was no legislative authority existing for laying down a street railway within the limits of the city, and the agreement therefore provided that application should be made to the legislature, and as soon as the legislative authority was obtained the plaintiffs should pass a by-law to make it effectual.

Accordingly in the session of 1861, the Toronto Street R. Co. were incorporated, and the agreement in question was validated, and the corporation of the city of Toronto authorized to pass any by-law or by-laws for the purpose of carrying it into effect.

The act gave full power to construct and operate their railway upon or along any of the streets of Toronto, on first obtaining the consent of the corporation.

That consent had been previously obtained, as to certain streets therein referred to, under the agreement in question, embodying a number of resolutions of the council, prescribing the conditions on which the road was to be constructed and operated, in which after setting forth those conditions also set forth the covenants binding on the railway company among which is the following :

"That the said party of the second part, his heirs, executors, or administrators, shall and will at all times employ careful, sober, and civil agents, conductors, and drivers, to take charge of the cars upon the said railways, and that he the said party of the second part, his heirs, executors, and administrators, and his and their agents, conductors, drivers, and servants, shall and will from time to time, and at all times during the continuance of this grant, and the exercise by him and them of the rights and privileges hereby conferred, operate the said railway, and cause the same to be worked under such regulations as the common council of the city of Toronto may deem necessary and requisite for the protection of the persons and property of the public, and provided such regulations shall not infringe upon the privilege granted by the said resolutions."

After the passing of the Act of Parliament, the corporation passed a by-law ratifying the agreement, and authorized the company to proceed with the work under the conditions, provisos, and restrictions, in the resolutions and agreement contained, and such other regulations as were therein set forth, or might from time to time be deemed necessary for the protection of the citizens of Toronto.

The agreement provided that the road should not be operated until a certificate was obtained from an officer of the council, and the by-law contains the clause :

Provisions of agreement.

" That before the certificate hereinbefore referred to shall be granted, the said Alexander Easton shall submit to the council of the corporation of the city of Toronto for their approval, the rules and regulations for the government and guidance of the conductors and drivers upon the said railways, and others connected with the working thereof, which said rules and regulations when approved by the said council, shall be posted in some conspicuous place in each car or carriage, and no car or carriage shall be run upon any of the said railways without a copy of said rules and regulations being placed therein."

This was done, and these rules and regulations were approved and sanctioned by the council and are still in force.

As I understand the agreement, the rules and regulations of the company, and which they alone were entitled to make, were to be of no force or effect until sanctioned by the council, and it may be, I do not say it is so, but it may be that any new regulation might require to be sanctioned in like manner, but I do not understand that the city can impose regulations of their own upon the company in reference to the management of their cars, or other purely domestic arrangements or corporate business of the company entrusted by law to the railway corporation itself, and with great deference I think this is a regulation of that nature.

Imposition of regulations by city.

I do not agree with the learned chancellor in the construction placed by him on the 6th paragraph of the agreement, that it imposed upon the defendants the duty necessarily of having two persons to perform the duties of driver and conductor ; pushed to its logical conclusion that argument would not restrict the duty to employ two persons only, but would require three or even more persons to be employed on each car, for it applies to agents, conductors, drivers, and servants. I am satisfied that all that is required under that paragraph is that the company shall employ careful, sober, and civil servants.

Two persons as driver and conductor not required.

No doubt with the double horse-cars a conductor was necessary, and although I do not agree with the counsel for the defendants as to the construction of paragraph seven of the agreement, that the company were under any obligation to furnish cars from time to time of the most modern style, there is nothing in the agreement to prevent them doing so.

The paragraph, however, has only reference to the cars that were to be put on the road at the opening, and before applying for the certificate referred to in the next section.

No doubt, when applying to the council for their consent to lay

down rails on other streets than those to which the original consent extended, the council might prescribe the conditions on which the permission should be granted.

The defendants are of course liable to any person injured by the negligence of their servants, whether that person be a passenger, or one of the public not using the railway; and

Restrictions on police power of council.

I take it for granted that the council under its ordinary powers could pass such reasonable regulations for the protection of the public, which I may designate or distinguish as police regulations, as are not inconsistent with or in derogation of the privileges granted under the agreement and act of Parliament; but their police powers regulating the general use of the streets and the safety of the public generally are to this extent restricted, that they must not infringe upon the privileges granted by the charter, and resolutions.

But in my view this is a pure matter of internal management which cannot originate with the council, and that there is nothing in the regulations originally sanctioned by the council to prevent their operating the road by the use of the one-horse cars in the manner they are doing.

I think, therefore, that the appeal should be allowed and the action dismissed, with costs.

PATTERSON, J.A.—The order from which the defendants appealed is that they, their officers, servants, workmen, and agents be restrained from using or operating cars upon their lines of railway in the city of Toronto, or any part thereof, without having a conductor as well as a driver upon each and every of the said cars and vehicles, the court further declaring that the plaintiffs are entitled to specific performance of the agreement entered into by them on March 26th, 1861, in the pleadings mentioned, in this respect.

The agreement was between the city and Alexander Easton.

Terms of agreement.

It recited certain resolutions passed by the common council on the 14th of March, 1861, by way of acceptance of a proposal of Easton to construct and operate street railways on some of the streets of the city. There were twenty-four resolutions. No. 7 prescribed the kind of rail to be used, and declared that the cars were to be constructed in the most modern style; and No. 8 provided that each car employed on the railway should be numbered, and that none should be used except under a license for that purpose, for which license the proprietor should pay the annual sum of five dollars. The city, in consideration of the amounts to be paid by Easton, his executors, administrators, or assigns, by and under the resolutions and those presents, and of the covenants and agreements therein on his part to be kept and performed, gave and granted

to Easton, his executors, administrators, and assigns, the exclusive right and privilege to construct, maintain, and operate street railways by single or double tracks in, along, and upon King street, Queen street, and Yonge street, for thirty years, upon the conditions, and subject to all the payments, regulations, provisions, and stipulations in the resolutions and those presents expressed and contained. Then followed some covenants by the city, among which was a covenant to pass a by-law framed in accordance with the resolutions as soon as legislative power to do so was obtained. Easton also entered into covenants numbered from one to seven.

Nos. 1, 2, and 6 may be specially noticed.

(1) "That he will construct, maintain, and operate the said railways within the times, in the manner, and upon the conditions in the said resolutions and these presents set forth.

(2) "That he will well and truly pay the said license fees, and will truly and faithfully perform, fulfil, and keep all the conditions, covenants, and agreements in the said resolutions, and these presents expressed and contained on his and their part to be performed, fulfilled, and kept. . . .

(6) "That the said party of the second part, his heirs, executors, or administrators shall and will at all times employ careful, sober, and civil agents, conductors, and drivers to take charge of the cars upon the said railways, and that he, the said party of the second part, his heirs, executors, and administrators, and his and their agents, conductors, drivers, and servants shall and will, from time to time and at all times, during the continuance of this grant and the exercise by him and them of the rights and privileges hereby conferred, operate the said railway, and cause the same to be worked, under such regulations as the common council of the city of Toronto may deem necessary and requisite for the protection of the persons and property of the public, and provided such regulations shall not infringe upon the privilege granted by the said resolutions."

The act of 24 Victoria, ch. 83, passed on the 18th of May, 1861, incorporated the Toronto Street R. Co.

That is not the company which is defendant in this action. The enterprise which it inaugurated passed through vicissitudes which led to the franchise and property becoming vested in individual purchasers, who obtained in 1873 a new act of incorporation, 36 Vict. ch. 101. The old name was transferred to the new company, and it became subject to the provisions of the former act, and to the obligations contracted under it so fully that we may discuss the act as if it had always applied to the defendant company, and may, for all present purposes, treat the defendants as the company incorporated in 1861.

Company defendant in action.

The company was empowered by section 6 to use and occupy such parts of the streets and highways of the city of Toronto, and of the municipalities immediately adjoining the limits of the city, as should be required for laying rails, etc.: "provided always that the consent of the said city and municipalities respectively shall be first had and obtained, who are hereby respectively authorized to grant permission to the said company to construct their railway aforesaid within their respective limits, across and along, and to use and occupy the said streets or highways, or any part of them, for that purpose, upon such conditions and for such period or periods as may be respectively agreed upon between the company and the said city or other municipalities aforesaid, or any of them."

By section 14, the city and the adjoining municipalities, or any of them, and the company are respectively authorized to make and enter into any agreement or covenants relating to various specified matters, including the time and speed of running of the cars, the amount of license to be paid by the company annually, the amount of fares to be paid by passengers, and generally for the safety and convenience of passengers, the conducts of the agents and servants of the company, and the non-obstructing or impeding of the ordinary traffic. And by section 15 the city and the municipalities were authorized to pass by-laws for the purpose of carrying into effect any such agreements or covenants, and containing all necessary clauses, provisions, rules, and regulations for the conduct of all parties concerned, and for the enjoining obedience thereto, and also for facilitating the running of the cars, and for regulating the traffic and conduct of all persons travelling upon the streets and highways through which the railway should have been laid.

The 16th section declared the agreement of the 22d of March valid and binding, and authorized the city to pass a by-law or by-laws to carry it into effect.

By-law 353 was accordingly passed in July, 1861. The only clauses of it which require notice are the first three, which read thus:

"1. That the said agreement hereinbefore recited shall be, and the same is hereby, ratified and confirmed: and the said Alexander Easton is hereby authorized to lay down street railways on King street, Queen street, and Yonge street, and work the same under the conditions, provisions, and restrictions in the said resolutions and agreement contained, and such other regulations as are herein set forth, or may from time to time be deemed necessary by said council for the protection of the citizens of the said city of Toronto.

"2. That so soon as the said railways, or any of them, are

constructed and certified to in the manner and according to the terms of the said agreement, the said Alexander Eaton may commence to run cars or carriages, and convey passengers thereon, and collect the fare for the same, as settled by the said resolution and agreement, and fully operate the said roads.

"3. That before the certificate hereinbefore referred to shall be granted, the said Alexander Easton shall submit to the council of the corporation of the city of Toronto, for their approval, the rules and regulations for the government and guidance of the conductors and drivers upon the said railways, and others connected with the working thereof, which said rules and regulations, when approved by the said council, shall be posted in some conspicuous place in each car or carriage; and no car or carriage shall be run upon any of the said railways without a copy of said rules and regulations being placed therein."

The injunction is to enforce by-law No. 1264, which was passed on the 18th of December, 1882, and which required that "Every street-railway car in use on the several lines of street railway in the city of Toronto shall be provided and furnished, not only with a driver, but also with a conductor, who shall discharge his duties as such conductor in the manner provided by by law No. 353," etc.

It is not clear what this last direction is meant to refer to, or how it aids the object recited as the motive for passing by-law 1264, which is to make further provision for the protection of the citizens of Toronto, and prevent accidents resulting from the use of street-railway cars without conductors.

One of the resolutions of the 14th of March, 1886, was that the conductor shall announce to the passengers the names of the streets and public squares as the cars reach them.

The resolutions are recited in the agreement of the 22d of March, and that again in by-law 353: but that by-law does not in any other way provide for the manner in which the conductor shall discharge his duties, except by the general stipulation that all agents, conductors, and drivers are to be careful, sober, and civil.

Conductor's
discharge of
duties.

This may be of little direct importance.

The great question must be, the power of the city council to impose upon the company the restrictions contained in by-law 1264.

I do not rest at all on the deliverance being cast in the form of a by-law. The objections at one time urged on that score are not insisted on. We are to take it as an expression of the will of the council, without necessary regard to the technical form in which it is declared. This is no doubt the proper way to treat the document, for the purpose of the present inquiry.

Form of by-
law.

The first question is the construction of the instruments of 1861, on the combined effect of which primarily depends what may be called the legislative jurisdiction of the council. These are the resolutions, the agreement, the statute, and the by-law 353. This legislative jurisdiction is not necessarily conclusive as to the power or the right to insist on the terms of by-law 1264, but it of course lies at the root of the inquiry.

I do not think anything can turn on the stipulation in article 6 of the agreement, that the company—or Easton, whose place the company fills—"shall at all times employ careful, sober, and civil agents, conductors, and drivers to take charge of the cars upon the railways," as in any sense implying an obligation to have a conductor on each car. No one attempts to argue that three men—agent, conductor, and driver—were to be employed, nor has it been suggested that the company required to be bound by contract to have a driver. The draughtsman would not be more likely to stipulate for the employment of a conductor than a driver, because one would seem to him as much of course as the other, the one-horse car not then having been invented, and the only cars in use being the large car, which carried the two men. His aim evidently was to omit nobody from his stipulation for carefulness, sobriety, and civility: therefore he inserted the comprehensive word "agents." Instead of "agents, conductors, and drivers," he might as well have used the term "agents and servants," which we find in the 14th section of the statute, under which alone, as I am about to show, there was power to make any agreement or regulation for the working of any of the one-horse lines in the city.

The meaning, as I understand it, is no more than that the men employed are to be careful, sober, and civil men, and it is not to provide that any number of men shall be employed. I think that is very plainly expressed; and I think it was understood by the city council just as I understand it.

I account in that way for the fact that one-horse cars were introduced and were run for so many years without objection, and for the movement in the council against them taking the form of a by-law to make further provision, etc., and not of an action to enforce an existing agreement to employ conductors on all the cars.

The by-law recites that it is expedient to make further provision for the protection of the citizens of Toronto. This language is that of the first clause of by-law 353, which authorized Easton to work the railway on King street, Queen street, and Yonge street under the conditions, provisions, and restrictions in the resolutions

Construction
of instruments
of 1861.

Effect of stipu-
lation as to
employment of
conductors,
drivers, etc.

By-law for
protection of
citizens of
Toronto.

of the 14th and the agreement of the 22d of March, 1861, contained, "and such other regulations as are herein set forth, or may from time to time be deemed necessary by said council for the protection of the citizens of Toronto." We find the same language in the first resolution of the 14th of March, which authorizes the working of the railways "under such regulations as may be necessary for the protection of the citizens," and in the sixth article of Easton's agreement, where some qualifying words are added by way of proviso, which were perhaps not essentially necessary.

Easton then agreed that "he, his heirs, etc., and his and their agents, conductors, drivers, and servants would from time to time, and at all times during the continuance of that grant, and the exercise by him and them of the rights and privileges thereby conferred, operate the said railway and cause the same to be worked under such regulations as the common council of the city of Toronto may deem requisite for the protection of the persons and property of the public, and provided such regulations shall not infringe upon the privilege granted by the said resolutions."

The qualification thus expressed would most likely have been implied. It is, in effect, a declaration that the contract between the two contracting parties was not to be varied by the separate act of one of them.

It is important to observe that the rights and privileges conferred by that agreement were in respect only of lines of railway on Queen and Yonge streets, and on that part of King street between the Don and Bathurst street.

Rights were afterwards given in respect of other lines; but, if the original agreement applies to them, it is not by its own force, but by the effect of some other agreement into which it may have been, in whole or in part, incorporated.

*Application of
agreement to
other lines.*

The terms on which it was extended to some other lines may be learned from a paragraph which I shall read from the statement of claim:

"12. By a certain agreement, under seal, bearing date the 29th day of July, 1881, and made between the plaintiffs of the first part and the defendants of the second part, after reciting that the plaintiffs' council had authorized the construction of certain new lines of street railway in the city of Toronto, and also the extension of certain existing lines along certain other streets upon the terms and conditions set forth in the by-law above referred to, being by-law number 253, and in the several statutes relating to the Toronto Street R. Co., except in so far as modified by the said agreement, the defendants, for themselves and their successors, covenanted, promised, and agreed with the

plaintiffs, and their successors, to build, construct, and operate the several lines and extensions of lines in the said agreement more particularly set out and subject to the conditions and terms of the said by-law number 353, and the several statutes of Canada and province of Ontario relating to the Toronto Street R. Co., and also subject, among others, to the following conditions, that the said lines and extensions of lines should be built in the following order: Church street, Strachan avenue and Exhibition road, Dundas street from Queen street to Dufferin street, Queen street from Yonge street eastward to King street, Spadina avenue from College street to Bloor street, and Bathurst street from King street to Bloor street. And it was further agreed and understood by and between the plaintiffs and the defendants, in and by the said agreement, that nothing therein contained should operate to prejudice, interfere with, derogate from, or in any wise modify, except as therein expressly provided, the rights and liabilities of the parties under the agreement, by-law, and statutes theretofore enforced, regulating the relations of the parties thereto, and that the lines of railway tracks to be laid by the defendants under that agreement should, when built, be considered as coming to all intents and for all purposes within the operation of the said former agreements, by-laws, and statutes, except as therein otherwise expressly provided."

This agreement of 1881 does not embrace all the new lines. There are five or six others, besides extensions of the Queen and Yonge street lines.

When we are asked to apply the term of the first agreement to any line but the original lines, we must remember that it can apply only as a new agreement made at the later date under the powers given by the 14th section of the statute; and can only apply by virtue of its adoption by some other substantive agreement like that of 1881; and that the privileges granted in respect of new lines, and which are not to be infringed under color of regulations made by the council, are those granted by the new agreements, and are not necessarily the same as those conferred in respect of the original lines.

Before further discussing that subject, I propose to consider whether the regulation embodied in by-law 1264 is one of those which were to be within the legislative jurisdiction of the council.

Whether regulation was within legislative jurisdiction of council.

What is the force of the thrice repeated expression, "the protection of the citizens;" "the protection of the persons and property of the public;" "the protection of the citizens of Toronto?"

I accede to the argument, on behalf of the company, that the general public using the streets through which the lines of rail-

way run, and not the passengers carried by the cars of the company, are here intended.

This is not because I regard the expression "the public" as altogether inappropriate to denote or to include the persons who use a public conveyance. I find it employed in that sense in the 14th resolution, which requires that when the track is impeded by snow, sleighs shall be provided for the accommodation of the public. The context there explains what is meant. But here we have "citizens" used as an equivalent term; we have the fact that the power is reserved by the city in connection with the grant of a right to encroach upon the public easement; we have no allusion in terms to the protection or convenience of passengers; and we have the reference to the protection of property, while resolution 13 provides that the cars shall be used exclusively for the conveyance of passengers.

The qualification appended in the agreement aids this construction, because the privilege that is not to be infringed by the regulations is the right to use the streets.

The statute also has an important bearing.

The power given to municipalities by section 14, to take part in arrangements for the safety and convenience of passengers, the conduct of the agents and servants of the company, and the non-obstruction or impeding of the ordinary traffic, is only by agreements made between the municipalities and the company, and not by any legislative act of the municipal council.

There is to be joint action to guard the ordinary traffic from being impeded by the railway; and under section 15 the municipalities alone are empowered to save the railway from being obstructed by the ordinary traffic.

The statute does not vary the agreement, but it supplements it by the provisions of section 14.

The agreement would, I apprehend, have to be interpreted consistently with the statute if there was ambiguity in its terms, and could even be construed to give powers at variance with those conferred or recognized by the statute. There is no conflict; but it must not be forgotten that the confirmation of the agreement by the statute did not extend it to any lines but those to which it always applied. The only power to make agreements respecting new lines, was the power expressed in the statute, and that power could not be exceeded by assuming to place the new lines under the original agreement.

The details mentioned in section 14, all of which I have not spoken of, deserve to be further noticed. They seem to me decisive against the power of the Municipal Corporation to control any of the operations of the company, except under a joint agreement. These details include the construction of the railway, its location upon the streets, the pattern of rail, the time

and speed of running of the cars, the amount of license to be paid, the amount of fares to be paid by passengers, the time within which the works are to be commenced, the manner of proceeding with the same and the time for completion, besides the general heads of the safety and convenience of passengers, the conduct of the agents and servants of the company, and the non-obstructing or impeding of the ordinary traffic. They also include several things which are not, as a rule, undertakings of the company, but which are calculated to interfere with its operations, viz. : the paving, macadamizing, repairing, and grading of the streets, the construction, opening, and repairing of drains and sewers, and the laying of gas and water pipes.

These details were not overlooked in the arrangement of 1861, nor were the general heads of the safety and convenience of passengers, the conduct of agents and servants, and the ordinary traffic, but they were dealt with as matters of agreement, not of unilateral regulation.

The regulation promulgated by by-law 1264 is, in my view of the power of the council, wholly unauthorized, even assuming what is not proved, that all the new roads are governed by the terms of the original agreement.

It is a direction to the company as to the mode in which it is to conduct its business—a matter which, if the council can meddle with it at all, must be the subject of a joint agreement.

The claim on the part of the city goes almost the length of asserting an absolute discretion in the council to attach new obligations and new restrictions to the conduct of the business of the company, by declaring them to be necessary for the protection of the citizens.

The liability of such a power to abuse and to be used oppressively proves the wisdom as well as the importance of the limitations which I deduce from section 14 of the statute.

Limitations
on power of
council.

The limitation is, in my opinion, twofold—first, as to the subject-matter, which is the protection of the general public, and not the safety and convenience of passengers; and, secondly, the nature of the regulations, subject to which the company is to “operate the railway and cause the same to be worked.” These are not, as I read the provisions, to require the company to do anything in the way of construction, or in the working of its cars, or fulfilling its duties to its passengers; but only to submit to what the council may think it necessary to do, such, perhaps, as closing a gate across the track when there is danger, or to obey such directions as to come to a stop at certain crossings, or to hang a bell to every horse’s harness.

This construction is, moreover, entirely consistent with what one would naturally suppose to have been in the minds of the

contracting parties. The details affecting every department of the enterprise having been arranged by the mutual agreement of Easton and the council, and carefully set down in the deed, it would be a surprise to find that one of the parties to the contract had been intentionally invested with power to impose at discretion new terms looking to the interest of the party framing them, for the public and the council are one party in this matter, and which may be unreasonable, onerous, or unfair towards the other.

A large proportion of the evidence given for the plaintiffs was for the purpose of showing the propriety of the regulation.

It did not bear on the motives of the council in passing the by-law more directly than as a basis for a claim of a posteriori reasoning.

Propriety of
regulation—
Convenience of
passengers.

What was arrived at was, I think, rather to convince the court that the regulation was not unreasonable.

There would be no object, in the view I take of the regulation itself, in entering upon an examination of the evidence in detail.

The greater part of it was addressed to the subject of the safety and convenience of passengers, and quite as much to the convenience as the safety.

Witnesses give their ideas of what passengers would gain if there was always an attentive conductor at hand to render such services as reaching out his hand to keep them from stumbling as they walk up the car, or to assist, as they get on or off, the very old and the very young, the feeble of any age, and the lady encumbered with parcels. The opinions given are now and then illustrated by the narration of incidents from the observation of the witness. These are, with some exceptions, of a nature inseparable from this kind of travelling, and familiar to the experience of people who ride in two-horse cars with a conductor, as well as of those who use the one-horse vehicle.

I do not in the least doubt the sincerity of the witnesses, or the goodness of their motives; yet the evidence on this particular topic seems to me, on the whole, of so fanciful and impulsive, not to say sentimental, a character, that, although made to do service for presentation to the court, I can hardly imagine a body of business men, whether the directors of a company or civic functionaries, seriously considering it as a basis for practical action in the conduct of a commercial enterprise.

The protection of the general public, though not so prominent a topic as the alleged grievances of the passengers, is not overlooked in the examination of the witnesses. The danger suggested is that people may be run over when the driver's attention is given to the inside of the car. It is shown that on six or seven occasions, three of them being since the passage of the by-law, coroners' juries having

Same—Protection of general public.

recommended that every car shall have a conductor as well as a driver; but what range of inquiry led to these suggestions is not shown.

A record of accidents is kept by the company, and it happens to show that more than a fair proportion are chargeable to the two-horse cars, the inference from which fact is not weakened by Mr. Lefroy's suggestion, that drivers of one-horse cars have inducements not to report every accident, unless we assume without any evidence that there have been accidents which have not been reported.

Evidence is given on the part of the defendants, apparently of great weight, that, for reasons which the witnesses explain, the one-horse car is attended with less danger than the larger and heavier vehicle, though the one has a conductor and the other has only one man to do all the duty. After reading it all, I have no idea that upon the question of the comparative danger, to persons in ordinary use of the street, from one kind of car or the other, it could be reasonably held that the one-horse car was the greater source of danger; while I take the proposition, which was so much labored, to be self-evident, namely, that accidents will be more likely to be averted by the vigilance of two men than of one.

All this goes, however, only to the reasonableness of the regulation, if its reasonableness can be inquired into, in case the council had power to impose it.

We are not concerned with the question whether it was passed, as one alderman tells us it was, under pressure from the Knights of Labor, or from an intelligent apprehension of its necessity, provided the council had the absolute power which is claimed, but which in my opinion they do not possess.

There is another important aspect of the case.

The one-horse car is shown to have first come into use some years after 1861, and to have been very generally adopted in the cities of the United States and Canada. Persons competent to speak on the subject describe its advantages, as well as the extent to which in New York, Philadelphia, and other cities it almost monopolizes the traffic, not in outlying or thinly populated districts, but in the most crowded thoroughfares. They inform us that the most invariable practice, in the ordinary use of the car, is to employ but one man, whether he is called driver or conductor; that what is now insisted on by the city council of Toronto is unknown elsewhere; and that no physical impossibility stands in the way, and the form of the one-horse car in use here, which is not a bob-tailed car, would afford accommodation for a conductor, yet on commercial grounds it is out of the question.

The fair result of their evidence, which is not met by any

Extent of use
of one-horse
cars.

contradiction, is that, if these cars are to be used at a profit and not a loss, they must be worked by one man and not by two.

It is further made clear, by evidence which is not rebutted, that the only feasible way of opening up the new routes in the city as they were pressed for by the citizens, and urged on the company by the council, and the only way ever contemplated was by means of those one-horse cars. These routes were not opened simultaneously, but one would be opened and run by the one-horse car, and application made to the council for another which would be run in the same way. Opening up
new routes.

The King-street line, which is usually run with single-horse cars, was not opened until 1874. Part of it had been authorized in 1861, and part as late as 1874.

Each car, as procured, was numbered according to agreement, and the license fees paid every year, the number licensed rising from 28 in 1878 to 125 in 1887 and 140 in 1888.

The stipulation that the cars should be constructed in the most modern style applied to the King-street line, and to every other line to which the terms of by-law No. 353 were made applicable.

A list, which is in evidence, shows the purchases of one-horse cars from 1874, when they were first introduced, to 1885: seventy-three within that time.

I think the proper construction of the dealings between the council and the company is that to employ the one-horse car never was in violation of any agreement, expressed or understood. On the contrary, I am inclined to think, though I do not look at it as free from all doubt, that the city might have availed itself of the improvement effected by the invention of that style of car, and insisted on its adoption by the company whenever new cars were required. One-horse cars
permitted.

I further think that each agreement or permission for the construction of a new line of railway must be taken to have been made in contemplation of the mode of operation actually in use, nothing to the contrary appearing.

It was, in effect, a grant of the right to work the line in that manner, and by-law 1264, even assuming jurisdiction in other respects, is an infringement of the privileges so granted.

I am of opinion that we should allow the appeal with costs, and dismiss the action with costs.

OSLER, J.A., dissented.

Appeal allowed with costs; and action dismissed with costs.

86 A. & E. R. R. Cas.—5

CHICAGO CITY R. CO.

v.

ROBINSON.

*(Illinois Supreme Court, Nov. 15, 1888.)***Street Railways—Injuries—Motive Power—Contributory Negligence.—**

The fact that a person starts to cross a street-railway track, without first stopping and looking before approaching the cars, is not, as matter of law, negligence; whether he is in the exercise of ordinary care is a question of fact for the jury; and this is true whether the cars accustomed to run upon such track are horse-cars or grip-cars.

Same—Grip-car—Failure to give Signal of Approach—Negligence.—

Where street-car tracks are in close proximity to run a grip-car or train of cars in one direction at a rapid although not an unlawful rate of speed, and without signal or warning over a sidewalk crossing, while a car or train bound in the opposite direction is discharging its passengers at such crossing, whose view of the approaching train is obstructed by the standing cars from which they are alighting, is conduct fairly tending to prove culpable negligence.

Same—Use of Due Care—Imputed Negligence.—If at the time of an injury to a child caused by the negligence of another, the child itself was in the exercise of all the care the occasion required, the fact that the parent was not at the time in the exercise of care and diligence for the safety for the child is not a defence, and the question of culpable negligence is immaterial.

APPEAL from the First District of the Appellate Court.

Action by Mary A. Robinson, administratrix of the estate of Wm. A. Robinson, deceased, against the Chicago City R. Co., to recover for the death of the intestate caused by the negligence of the defendant in running a grip-car. The appeal is brought by defendant from a judgment affirming a verdict and judgment for plaintiff.

Hynes & Dunne for appellants.

Frank J. Smith & Helmer for appellee.

BAKER, J.—In this case appellee, as administratrix of her intestate, a boy some six years old, recovered judgment in the Cook circuit court for \$1500 damages against appellant, for wrongfully causing the death of such intestate through the negligence of its servants. The judgment was affirmed in the appellate court of the first district. Two grounds are urged in this court for the reversal of the judgment. One is the refusal of the trial court, when the plaintiff below rested her case in chief, to instruct the jury to find for the

Case stated.

defendant, because there was no evidence of negligence on the part of defendant, and no evidence of due care on the part of the plaintiff. We cannot accede to either of the propositions involved in the motion that was made by appellant. It is only when the conclusion of negligence necessarily results from the statement of fact that the court can be called upon to say to the jury that a fact establishes negligence, as a matter of law. *Railroad Co. v. O'Connor*, 119 Ill. 586.

Contributory
negligence not
matter of law.

The fact that a person passing over a sidewalk-crossing in a city steps onto the track of a street railroad, whether the cars accustomed to run thereon are horse-cars or grip-cars, without first stopping and looking to see whether a car is approaching, is not, as matter of law, and without any regard to surrounding circumstances, negligence and a want of ordinary care. The question of negligence and a want of ordinary care is, in such case, a question of fact for the determination of the jury in the light of the attendant circumstances.

Where street-car tracks are in close proximity, to run a car or train of cars in one direction, at rapid speed, and without signal or warning, over a sidewalk crossing while a car or train bound in the opposite direction is discharging passengers at such crossing, and where, as in this case, the view of the approaching train is obstructed by the standing cars from which the person injured has just alighted, is surely conduct which fairly tends to prove culpable negligence, even though the rate of speed of such approaching train does not exceed that which is permitted by ordinance; and it cannot be said, as matter of law, that such conduct is not negligence. From the testimony for appellee contained in this record, we think it was not manifest error to deny the motion of appellant to take the case from the jury.

Negligence in
running cars.

It is urged that the first instruction for appellee was erroneous, in that it contained no reference to the element of contributory negligence on the part of the mother of the deceased child. The theory of the instruction was that the child himself was in the exercise of ordinary and reasonable care at the time he was killed. Several of the instructions given at the instance of appellant were predicated upon the same theory of fact that lies at the foundation of this instruction in question, i.e., that the deceased was capable of exercising ordinary care and prudence; and said instructions stated fully the duty thereby incumbent upon deceased in that regard. The jury, in returning a verdict for appellee, under the instructions of the court, must necessarily have found that the child was in the exercise of ordinary care and prudence. In such state of the case,—and it is the case stated hypothetically in the instruction,—it would be a matter of no

Imputing pa-
rents' negli-
gence to child.

moment, in respect to the liability of appellant, what degree of care and diligence the mother was exercising for the safety of her child, since the child himself was using all the care which the occasion required. In a case where the conduct of an infant would not be negligence in an adult, the question of imputable negligence is immaterial. *Cumming v. Railway Co.*, 10 N. E. Rep. 855. The view that the minor did not use and was incapable of exercising care, by reason of his tender years and immature judgment, and that, in the event the jury so found, the doctrine of imputable negligence, on account of the neglect of the mother, was applicable to the case, was fully given to the jury in instructions tendered by appellant. Appellee made no claim at the trial that the age of the deceased would excuse in him conduct which would be negligence in a person of mature judgment; and, as the case went to the jury upon the instructions, the issue was conceded to appellant, without the jury found from the evidence that the child was in the exercise of ordinary care at the time he was killed. We think the instruction complained of was not erroneous.

The judgment of the appellate court was affirmed.

BAILEY, J., having heard this case in the appellate court, took no part in its decision here.

Injuries to Persons in Street by Street Railways.—See *Hays v. Gainesville St. R. Co.*, 34 Am. & Eng. R. R. Cas. 97; *Donnelly v. Brooklyn City R. Co.*, 34 Ib. 103; *North Hudson St. R. Co. v. Ilsey*, 34 Ib. 94; *Orange, etc., R. Co. v. Ward*, 25 Ib. 359, note 362; *Citizen's St. R. Co. v. Steen*, 19 Ib. 30; *Dahl v. Milwaukee City R. Co.*, 19 Ib. 121; *Wood v. Detroit City R. Co.*, 19 Ib. 129; *Roller v. Sutter St. R. Co.*, 19 Ib. 333; *Ferris v. Cass Ave. R. Co.*, 1 Ib. 622; *Maschek v. St. Louis R. Co.*, 2 Ib. 38; *Phila. City Pass. R. Co. v. Henrice*, 4 Ib. 544.

Injury to Infant—Doctrine of Imputed Negligence.—There is some conflict in the authorities regarding the doctrine of imputed negligence, but the better opinion is that the negligence of a parent or guardian cannot be imputed to an infant who is injured through the carelessness of another party. *Government Street R. Co. v. Hanlon*, 53 Ala. 70; *Bronson v. Southbury*, 37 Conn. 199; *Daley v. Norwich & W. R. Co.*, 26 Conn. 591; *Birge v. Gardiner*, 19 Conn. 507; *Mackey v. Mayor, etc., of Vicksburg*, 64 Miss. 777; *Frick v. St. Louis R. Co.*, 75 Mo. 542, 595; *Stillson v. Hannibal R. Co.*, 67 Mo. 671; *Boland v. Missouri R. Co.*, 36 Mo. 484; *Huff v. Ames*, 16 Neb. 139; s. c., 49 Am. Rep. 716; *Bissaillon v. Blood (N. H.)*, 15 Atl. Rep. 147; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399; *Philadelphia & I. R. Co. v. Long*, 75 Pa. St. 257; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269; s. c., 3 Am. Rep. 628; *Northern Pa. R. Co. v. Mahoney*, 57 Pa. St. 187; s. c., 6 Phila. (Pa.) 242; *Glassey v. Hestonville M. & F. P. R. Co.*, 57 Pa. St. 172; *Smith v. O'Connor*, 48 Pa. St. 218; *Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372; *Rauch v. Lloyd*, 31 Pa. St. 358; *Erie City Pass. R. Co. v. Schuster*, 113 Pa. St. 412; s. c., 57 Am. Rep. 471; *Whirley v. Whiteman*, 1 Head (Tenn.), 620; *Texas M. R. Co. v. Herbeck*, 60 Tex. 612; *Houston & T. C. R. Co. v. Simpson*, 60 Tex. 103; *Texas & P. R. Co. v. O'Donnell*, 58 Tex. 27; *Galveston H. & H. R. Co. v. Moore*, 59 Tex. 64; s. c., 46 Am. Rep. 265; *Robinson v. Cone*, 22 Vt. 213; s. c., 54

Am. Dec. 67; *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. (Va.) 455; *Whart. Neg.* 309-312; *Whart. Neg. sec.* 310, note.

The contrary and harsher doctrine is maintained in *Meeks v. Southern Pac. R. Co.*, 52 Cal. 602; s. c., 56 Cal. 513; 38 Am. Rep. 67; *Schierhold v. Northern R. Co.*, 40 Cal. 447; *Karr v. Parks*, 40 Cal. 188; *Kyne v. Wilmington & N. R. Co. (Del.)*, 14 Atl. Rep. 922; *Toledo W. & W. R. Co. v. Grable*, 88 Ill. 441; *Chicago & A. R. Co. v. Gregory*, 58 Ill. 226; *Chicago v. Starr*, 42 Ill. 174; *Gavin v. City of Chicago*, 97 Ill. 66; *Toledo, W. & W. R. Co. v. Grable*, 88 Ill. 441; *Chicago v. Hesing*, 83 Ill. 204; *Ohio & M. R. Co. v. Stratton*, 78 Ill. 88; *Chicago & A. R. Co. v. Becker*, 76 Ill. 25; *Hund v. Geier*, 72 Ill. 393; *Chicago City v. Major*, 18 Ill. 349; *Aurora B. R. Co. v. Grimes*, 13 Ill. 585; *Evansville & C. R. Co. v. Wolf*, 59 Ind. 89; *Hathaway v. Toledo, W. & W. R. Co.*, 46 Ind. 25; *Jeffersonville, M. & I. R. Co. v. Bowen*, 40 Ind. 545; s. c., 49 Ind. 154; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287; *Pittsburgh, F. W. & C. R. Co. v. Vining's Adm'r*, 27 Ind. 513; *Salter v. Burlington, C. R. & N. R. Co.*, 71 Iowa, 209; *Atchison, T. & S. F. R. Co. v. Smith*, 28 Kan. 541; *Smith v. Atchison, T. & S. F. R. Co.*, 25 Kan. 738; *O'Brien v. McGlinchy*, 68 Me. 552; *Leslie v. City of Lewiston*, 62 Me. 468; *Brown v. European & N. A. R. Co.*, 58 Me. 384; *Baltimore, C. P. R. Co. v. McDonnell*, 43 Md. 551; *McMahon v. Northern Cent. R. Co.*, 39 Md. 439; *McGeary v. Eastern R. Co.*, 135 Mass. 363; *Lynch v. Smith*, 104 Mass. 52; s. c., 6 Am. Rep. 188; *Mulligan v. Curtis*, 100 Mass. 512; *Lovett v. Salem, S. & D. R. Co.*, 91 Mass. (9 Allen) 557; *Callahan v. Bean*, 91 Mass. (9 Allen) 401; *Wright v. Malden & M. R. Co.*, 86 Mass. (4 Allen) 283; *Holly v. Boston Gas Light Co.*, 74 Mass. (8 Gray) 123; *Reed v. Minneapolis St. R. Co.*, 34 Minn. 557; *Fitzgerald v. St. Paul, M. & M. R. Co.*, 29 Minn. 336; s. c., 8 Am. & Eng. R. R. Cas. 310; 43 Am. Rep. 212; *City of St. Paul v. Kuby*, 8 Minn. 166; *McGarry v. Loomis*, 63 N. Y. 107; s. c., 20 Am. Rep. 510; *Thurber v. Harlem, B. M. & F. R. Co.*, 60 N. Y. 333; *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Cosgrove v. Ogden*, 49 N. Y. 355; s. c., 10 Am. Rep. 361; *Ihl v. Forty-Second Street R. Co.*, 47 N. Y. 317; s. c., 7 Am. Rep. 450; *McLain v. Van Zandt*, 39 N. Y., Super. Ct. (7 J. & S.) 351; *Mowrey v. Central City R. Co.*, 66 Barb. (N. Y.) 51; *Burke v. Broadway & S. A. R. Co.*, 49 Barb. (N. Y.) 532; *Mangan v. Brooklyn City R. Co.*, 36 Barb. (N. Y.) 238; *Lehman v. City of Brooklyn*, 29 Barb. (N. Y.) 234; *Honegsberger v. Second Ave. R. Co.*, 1 Keyes (N. Y.), 570; s. c., 2 Abb. App. Dec. (N. Y.) 378; *Kreig v. Wells*, 1 E. D. Smith (N. Y.), 77; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615; s. c., 34 Am. Dec. 273.

This latter doctrine has been severely criticized (see *Beach Contrib. Neg. sec. 42*), and seemingly not without justice when we remember that an infant plaintiff would be entitled to damages for the defendant's negligent injury to his property when similarly exposed to danger by the carelessness of his guardian. See *Bisaillon v. Block* (N. H.) 15 Atl. Rep. 147; *Giles v. Boston & M. R. Co.*, 55 N. H. 555; *Smith v. Eastern R. Co.*, 35 N. H. 366, 367; *Davies v. Mann*, 10 Mees. & W. 546. Thus if a donkey is carelessly run down in the highway where it is negligently exposed, the defendant is held liable (*Davies v. Mann*, 10 Mees. & W. 546), and where oysters are carelessly placed in a river bed and they are negligently disturbed by a vessel, it will be an injury redressible in damages (*Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Vennall v. Garner*, 1 Crompt. & M. 21), and while a lunatic or a cow may trespass, negligence, which is a want of reasonable care, is not to be predicated of the acts of a creature devoid of reason and governed by instincts alone, and damages may be recovered for negligent injury. *Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207; *Mackey v. Mayor, etc., of Vicksburg*, 64 Miss. 777; *O'Mara v. Hudson R. R. Co.*, 38 N. Y. 445; *Smith v. O'Connor*, 48 Pa. St. 218; *Hutching v. Engel*, 17 Wis. 230; *Sioux City & Pac. R. Co. v. Stout*, 84 U. S. (17 Wall.) 660; bk. 21, L.

ed. 748; *Washington & G. R. Co. v. Gladmon*, 82 U. S. (15 Wall.) 401; bk. 21, L. ed. 114; *Coley on Torts*, 105.

From this it would appear that if the child were an ass or a cow, or an oyster placed in the same position of peril through the negligent acts of another, either owner, keeper, or guardian, it would receive the protection which is denied to it as a human being of tender years in those jurisdictions which enforced the harsh doctrine laid down in *Hartfield v. Roper*, 21 Wend. (N. Y.) 615; s. c., 34 Am. Dec. 273. The decision in this case is not founded upon authority and does not seem to be supported by reason. See *Whart. on Neg. sec. 312*; *Thomp. on Neg. 1184, sec. 34 et seq.* *Beach on Contrib. Neg. § 42.*

The harsh doctrine laid down by the courts of New York, and which obtains in other jurisdictions, where a child is of such tender years as to be incapable of exercising any judgment or discretion, it cannot be charged with contributory negligence; but where a child has attained such an age as to be capable of exercising judgment and discretion, he is responsible for the exercise of such care and diligence as might reasonably be expected of one of his age and mental capacity placed in his position of peril. *Twist v. Winona & St. P. R. Co. (Minn.)*, 39 N. W. Rep. 402. See *Baker v. Flint & P. M. R. Co. (Mich.)*, 35 N. W. Rep. 836; *Powers v. Harlow*, 53 Mich. 507; *Mackey v. Mayor, etc., of Vicksburg*, 64 Miss. 777; *Huff v. Ames*, 16 Neb. 139; *Cassida v. Oregon R. & Nav. Co.*, 14 Oreg. 551; *Kansas Pac. R. Co. v. Whipple (Kan.)*, 18 Pac. Rep. 730.

In such a case it is for the jury to determine the child's capacity to apprehend apparent danger and whether or not it has exercised the requisite care to prevent injury. See *Moebus v. Herrmann*, 108 N. Y. 349; *Kunz v. City of Troy*, 104 N. Y. 344; *revsg. s. c.*, 36 Hun (N. Y.), 615; *Baker v. Flint & P. M. R. Co. (Mich.)*, 35 N. W. Rep. 838. See also notes, 15 Am. & Eng. R. R. Cas. 406; 15 Ib. 406.

Same—Suit by Parent.—Where a parent through whose negligence his child has been injured, sues for the loss of services sustained by the injury to the child, the contributory negligence of such parent will be a bar to recovery. See *Louisville & P. Canal Co. v. Murphy*, 9 Bush (Ky.), 522; *Huff v. Ames*, 16 Neb. 139; s. c., 49 Am. Rep. 716; *Glassey v. Hestonville, M. & F. P. R. Co.*, 57 Pa. St. 172.

PEOPLE *ex rel.* WEST SIDE R. CO.

v.

BARNARD, Comptroller.

(*New York Court of Appeals, October 16, 1888.*)

Horse Railway—Construction—Conditions—Bond to Secure Fulfilment of Contract.—Under the New York Laws of 1886, chap. 642, sec. 1 of which act requires that the right to construct a street railway shall be sold, at public auction, to the bidder who agrees to give the largest percentage per annum of the gross receipts, with security for the fulfilment of the agreement and for the commencement and completion of the road within the time specified in the act, and that notice shall be given of the sale, and of the conditions thereof; and sec. 3 provides that the secur-

ity shall be a bond in such form, condition, amount, and sureties as shall be required and approved by the comptroller or other chief fiscal officer,"—the comptroller cannot, unless required by the resolution of the council specified in the notice of sale, insert any conditions in the bond other than for the payment of the percentage of receipts, and commencement and completion of the road within the time limited.

Same—Refusal to Accept Bond—Mandamus.—*Mandamus* lies in favor of the purchaser at such sale, who has prepared a bond in form and amount and with sureties as approved by the comptroller, to compel its acceptance by the latter, whose only objection is that the bond does not contain conditions required by him which are not specified in the resolution of the council.

Same—Franchise—Requirements as to Carriage—Validity.—Since the statute provides a method whereby a street-railway company may acquire the right to use the track of another company running to points beyond its terminus, the fact that a resolution granting a franchise to a company requires the company to carry passengers to and from points beyond one of its termini for a single fare, does not render the franchise invalid.

APPEAL from Superior Court, General Term, Fifth Department.

Application by the West Side R. Co. for a *mandamus* against Joseph E. Barnard, comptroller of the city of Buffalo, to compel the defendant to accept and approve a bond executed by the plaintiff on the purchase of a franchise to construct and operate a street railroad. An order refusing the writ was entered, from which plaintiff appeals.

F. Brundage for appellant.

Wm. F. Worthington for respondent.

EARL, J.—It is approved in section 1, c. 642, Laws 1886, that the legal authorities of any incorporated city, to whom application may be made for the construction, maintenance, use, operation, or extension of a street railroad through any of the streets of such city, must provide, as a condition of the consent to the use of such street, that the right, franchise, and privilege of using the same shall be sold, at public auction, "to the bidder who will agree to give the largest percentage per annum of the gross receipts of such company or corporation, with adequate security, as hereinafter provided, for the fulfilment of such agreement, and for the commencement and completion of such road, according to the plan or plans and on the route or routes fixed for its construction, within the time or times hereinafter designated and prescribed therefor;" that the local authorities of any city may give such consent to any applicant therefor, duly incorporated and existing under the laws of this State, for the purpose of providing street-railroad facilities in the city; and the bidder to which such consent may be sold shall be an incorporated railroad company, organized to

Statutory provisions.

construct and operate a street railroad within such city; that, prior to such sale, notice of the time and place of sale, and the conditions upon which the consent of the city authorities to construct and operate the road will be given, shall be published as provided in the act; that the comptroller or other chief fiscal officer of the city shall attend and conduct the sale to be made under the provisions of the act; that the bidder or bidders to whom the consent or license shall be sold shall commence the construction of the road within one year, and complete the same within three years, from the date of sale. Section 3 provides that the security required by section 1 of the act "shall be a bond or undertaking in writing, and under seal, in such form, condition, amount, and sureties as shall be required and approved by the comptroller or other chief fiscal officer of any such city, and by the trustees of any such village." Under this act, and under the constitutional provisions applicable to the construction of street railways, the municipal authorities have the absolute power to grant or withhold their consent to

Insertion of
conditions not
in notice of
sale.

the construction of street railways; and they may impose any condition, however onerous and difficult to perform, which seems to them, in the exercise of their discretion, to be proper, as the terms upon which their consent will be given. But in the notice of sale provided for, the conditions which they impose must be specified; and no other conditions can be inserted therein, and none other can be exacted or imposed by the officer conducting the sale. The only security required by the law from the purchaser at the sale is the bond or undertaking to secure the payment of the percentage of gross receipts agreed to be paid and for the commencement and completion of the road within the time specified. The law does not require the purchaser to give any other security, and no other security can by the terms of the law be exacted. The local authorities may undoubtedly, in giving their consent to the use of the streets for the street railway, impose as a condition that a bond shall be given by the purchaser at the sale, containing any stipulations or conditions which they may see fit to prescribe. But, in the absence of such action by the local authorities, the comptroller has no right, under section 3, to exact security for the performance of anything except the three things specified in the act; and the conditions which he may require to be included in the bond are such only as relate to, and are appropriate to secure, such performance.

Now, what happened here? The common council of the city of Buffalo, upon due application made to it, did, by resolution duly passed on the 6th day of June, 1887, consent to the con-

struction, operation, and maintenance of a street railway in and along the following streets and places in the city of Buffalo, viz.: Commencing at the intersection of Virginia and Park streets, so as to connect with the track belonging to the Buffalo East-Side R. Co. in Virginia street; thence northerly, along Park street, with a single track, to Allen street, so as to connect with said company's tracks in Allen street; thence westerly, and upon said tracks of the Buffalo East-Side R. Co., in Allen Street, to Fremont place; thence northerly, in and along Fremont place, with a single track to Elmwood avenue; thence northerly along Elmwood avenue, with double tracks, to Forest avenue,—subject to the conditions, among others, that such franchise should be sold at public auction, pursuant to chapter 642 of the Laws of 1886, passed June 15, 1886; and that the rails to be laid and used in the construction of said railroad should be of the kind known as the 'Richards Patent Girder Rail,' and to be laid so that their edges shall be flush with the pavement; and, further, that the company receiving the grant should at all times keep and maintain the pavement between its rails in good condition and repair; and that passengers should be carried by the company receiving the grant, from Seneca Street, through the said route, to Forest avenue, for a single fare of five cents for one continuous passage." And notice of sale as prescribed in the statute was thereafter published as follows: "Notice is hereby given that the right, privilege, and franchise of using the streets, avenues, and public places in the city of Buffalo hereinafter described, for the purposes of a street railroad, will be sold by the comptroller of said city, at his office at the city and county hall, at Buffalo, N. Y., on the 6th day of August, 1887, at 10 o'clock A.M., at public auction, to the incorporated railroad or railway company organized to construct, maintain, and operate a street railroad in the city of Buffalo, which shall be the bidder who will agree to give, for such right, privilege, and franchise, the largest percentage per annum of its gross receipts; with security for the fulfilment of such agreement, and for the commencement of said road within one year, and for the completion thereof within three years from the date of said sale, according to the plan and along the route hereinafter specified. The security to be given by the purchaser upon such sale, as aforesaid, shall be a bond or undertaking in writing, and under seal, in such form, condition, amount, and securities as shall be required and approved by said comptroller. The purchaser at such sale of such grant, right, or privilege shall take the same only upon and subject to the following further conditions, viz.: First. That the rails to be laid in the construction of said railroad shall be of the kind

Facts—Consent to construction—Notice of sale.

known as the 'Richards Patent Girder Rail;' the said rails to be so laid that their edges shall be flush with the pavement; and the purchaser at said sale at all times to keep and maintain the pavement between its rails in good condition and repair. Second. That the purchaser, as hereinbefore specified, shall charge no greater than a five-cent fare for one continuous passage from Seneca street, along Main street, and over the route specified in this grant, to Forest avenue. Third. The right, privilege, and franchise, as aforesaid, to be sold, is the right, privilege, and franchise of using the following streets, avenues, and public places in the city of Buffalo, for the purpose of constructing, operating, and maintaining a street railroad as follows, [as stated in the resolution of the common council]. William E. Delaney, City Clerk." The relator bid at the sale 36 per cent of its gross receipts per annum, which was the highest bid, as determined by the comptroller; and the franchise was awarded to it, subject to its giving security as required by chapter 642 of the Laws of 1886. Thereafter, and within a reasonable time, the comptroller caused to be prepared and presented to the relator for its execution, and then and there demanded and required it to execute, a bond in the penalty of \$20,000, containing the conditions prescribed in the statute, and many other conditions. The relator, deeming the bond illegal and unauthorized by the law of 1886, made objections to certain conditions contained therein, and refused to execute the same. Thereupon it caused to be prepared and executed a bond, which it presented to the comptroller, in the penalty of \$20,000, in the same general form as the bond demanded by the comptroller, containing the conditions prescribed in the law of 1886, as well as some further conditions, which were also, with others, contained in the bond prepared by the comptroller; and it demanded that he should accept and approve the bond as the security required by the act of 1886. This he refused to do, giving as a reason for such refusal that it did not contain all the conditions specified in the bond presented by him to the relator; expressly admitting, however, that the sureties and the amount of the penalty were satisfactory. No objection was made to the general form of the bond, or that it did not contain all the conditions required by the statute of 1886, or by the resolution of the common council, or by the notice of sale as published.

We are of opinion that the comptroller was bound to accept and approve the bond. It contains all that the statute requires, and he had no right to exact any other conditions. He did not object, and could not object, to the other conditions contained in the bond. His sole objection was that some conditions were omitted from the bond which he determined ought

to be contained therein. The conditions, aside from those required by the statute for the payment of a percentage of gross receipts, and for the commencement and completion of the road within the prescribed times, were harmless, not illegal or against public policy, but were mainly, if not exclusively, conditions for the performance of such things as the law, without any agreement whatever, required the relator to observe and perform. There is no ground for claiming that the bond would be illegal and void as given *colore officii*, because it was voluntarily executed and tendered to obtain a franchise and privileges from the city; and, certainly, after by *mandamus* compelling the comptroller to accept and approve the bond, it could not be maintained by any of the obligors that it was illegally exacted from the principals. The bond being sufficient and unobjectionable in form, and the comptroller having approved of the amount of the penalty and of the sufficiency of the sureties, he had no further discretion to exercise, and was bound to accept and approve it; and these further acts were administrative merely. The bounds of discretion and judicial action having been passed, this is a proper case to compel the performance of his further duties by *mandamus*.

Comptroller
bound to accept
bond.

It has been said that the action of the common council was illegal and void, because it required the purchaser of the franchise to carry passengers from Seneca street through the route specified in the grant for a single fare of five cents for one continuous passage. The resolution undoubtedly required the railway company taking the grant to carry passengers to and from points beyond one of its *termini*. This was a condition which it could impose. It might be difficult for the company taking the grant to perform it. But it was not impossible to perform it, because, under the statutes, there was a way by which the relator could obtain the right to run upon the tracks of the East-Side Street-R. Co., which owned the road between Seneca street and one terminus of the route granted. If it should turn out that it could not comply with the terms of the grant in the respect mentioned, the result would be simply that it would be exposed to the forfeiture of its franchises and rights. It might be that the common council did not sufficiently protect the rights of the city and the interests of the public in the resolution granting consent to the use of the streets for the railway. But there is no help for that now. Its action is final, and everybody must abide by that. Its neglect, if there was any, cannot be remedied by exacting of the purchaser a bond which it is not bound to give. If, however, it should abuse its privileges, or violate any law or condition applicable to it, or so operate its road as to

Requisite that
passengers
should be carried
for single
fare.

annoy, oppress, or seriously discommode the public, the attorney-general, in behalf of the people, or the local authorities, in behalf of the city, or the legislature, in the exercise of the sovereign power, will doubtless find or devise some adequate remedy for every serious grievance.

Our conclusion therefore is that the orders of the general and special terms should be reversed, and the writ of peremptory *mandamus* should be issued, without costs.

All concur, except DANFORTH, J., not voting.

MOORE *et al.*, Commissioners,

v.

BROOKLYN CITY R. CO.

(*New York Court of Appeals*, Jan. 17, 1888.)

Street Railway—Removal of Depot—Injunction.—An injunction will not be granted restraining a city railroad company from moving its depot and business to a safer and more convenient place for the travelling public, thereby abandoning a portion of its road.

Same—Control of—Removal of Depot—Authority of Commissioners to Restrain.—Under the act of 1855, chap. 255, providing that highway commissioners may maintain an action against a railroad company to "sustain the rights of the public in or to a highway, or to enforce performance of any duty enjoined upon a railroad corporation in relation to a highway," the highway commissioners of the town of New Utrecht have no legal capacity to maintain an action to restrain a railroad company from changing the location of its depots, when the action is not brought for any of the purposes specified in the act.

APPEAL from General Term, Supreme Court, Second District.

This action is brought by Peter C. Moore, Henry Martin, and James Redmond, as highway commissioners of the town of New Utrecht, to restrain the Brooklyn City R. Co. from discontinuing the use of its depot at the terminus of its track, and a portion of such track, and establishing the terminus at another point. This appeal is brought from an order denying the injunction.

Wm. Sullivan for appellants.

Thos. E. Pearsall for respondent.

ANDREWS, J.—The real purpose of this action is to compel the defendant to maintain the terminus of its road at the intersection of Fort Hamilton avenue and the Shore road, as fixed by the consents of 1861, and to prevent the company from changing it from that point to a point

Case stated.

on the Shore road, distant about 600 feet from the intersection of the two streets mentioned. The other relief demanded is auxiliary to this same purpose. The plaintiffs, in bringing the action, claim to represent the interests of the public. The findings, however, show that the proposed change in the terminus of the road is demanded by public convenience and safety. It is found that the operation of the road along Fort Hamilton avenue and the Shore road was and is a dangerous obstruction to travel, and also that by the establishment of the proposed depot the public will be accommodated, and a dangerous obstruction will be removed from the highway.

It appears that the proposed change in the terminus will involve the abandonment of about 1000 feet of the road. The plaintiffs, by not incorporating the evidence in the record, have assented to the correctness of the findings. No remedy by injunction. Upon the facts found the action is apparently

prosecuted by public officers, not to subserve the public interest, but in hostility to them. The plaintiffs insist that they are entitled to maintain the action on the ground that the defendant is under a legal obligation to maintain and operate the road over the entire route specified in the consents of 1861, and to the precise terminus therein mentioned. There would be great difficulty in maintaining an action to compel the performance of this obligation, even if the public interests required its observance. *People v. R. Co.*, 24 N. Y. 261; *Palmer v. Plank-Road Co.*, 11 N. Y. 376. But it is, we think, a conclusive answer in this case to the remedy by injunction that no public injury will result from the proposed action of the defendant. The threatened violation of a mere naked legal right, unaccompanied by special circumstances, is not a ground for injunction, when, as in this case, legal remedies are adequate to redress any resulting injury. *McHenry v. Jewett*, 90 N. Y. 58, 2 Story, Eq. Jur. § 927, c. 1. If the defendant violates its charter, or fails to perform the conditions under which it exercises its franchises, or if, in the management of its trains or business, it unlawfully occupies or obstructs the public highway, the remedy in the former case is by a proceeding in behalf of the people by the attorney-general to annul or forfeit its franchise, and in the latter by indictment or proceedings under the statute.

We are also of opinion that in respect to the main relief the plaintiffs, as highway commissioners, have no legal capacity to maintain the action. This is not an action brought to "sustain the rights of the public in and to a highway, or to enforce the performance of any duty enjoined upon a railroad corporation in relation to a highway," within the act of 1855, c. 255; nor is it maintainable under the general law regulating the power and

Highway commissioners no capacity to maintain action.

duties of commissioners of highways. *Cornell v. Turnpike Co.*, 25 Wend. 365; *Cornell v. Town of Guilford*, 1 Denio, 510; *Palmer v. Plank-Road Co.*, *supra*.

The judgment should be affirmed.

All concur, except RAPALLO, J., absent.

Relocation of Station.—See *Attorney-General v. Eastern R. Co.*, 21 Am. & Eng. R. R. Cas. 237.

PEOPLE

v.

O'BRIEN *et al.*

(*New York Court of Appeals, November 27, 1888.*)

Street Railways—Limited Existence—Acquiring Fee in Land—Estate Taken.—A railroad corporation, although created for a limited period only, may acquire title in fee of lands or property necessary for its use; and where no limitation or restriction upon the right conveyed is contained in the grant, the corporation takes all the estate possessed by the grantor.

Same—Fee to Streets in New York City—Conveyance by Authorities.—The title to streets in the city of New York is vested in the city, in trust for the people of the state; and under the constitution and statutes, the state possesses authority to convey such title as is necessary for the purpose to corporations desiring to acquire the same for use as a street railroad.

Same—Granting Irrevocable Interest.—The city of New York has power to grant an interest in public streets for a public use in perpetuity, which shall be irrevocable.

Same—Franchise Vests Interest in Streets.—A grant by the duly constituted authorities of the city of New York, of the right to construct and operate its road in the streets of the city, is a grant in fee, vesting the grantee with an interest in the streets in perpetuity to the extent necessary for the purposes of its road.

Same—Broadway Surface Railway—Grant to—Interest Acquired—Repeal of Charter.—Under the grant from the city of New York to the Broadway Surface R. Co., of the right to construct and operate its road in the streets of the city, and to make traffic contracts with another company by which the latter should obtain the right to run cars over the tracks of the former company, which grant imposed no conditions or restrictions in respect to the duration of such contract rights or otherwise, the Broadway Surface Co. did not take a mere license, but an estate in fee in perpetuity, which estate constitutes property of which it and its grantees cannot be deprived by a subsequent act repealing its charter.

Same—Dissolution of Corporation—Succession.—If a legislative act dissolving a corporation makes no provision for the right of succession to its property, such right is governed by 1 N. Y. Rev. Stats. tit. 3, chap. 18.

secs. 9, 10, under which the title vests immediately in the directors, in trust for the creditors and stockholders.

Same—Constitutional Law—Due Process of Law.—Chapter 271, Laws of 1886, providing for the sale of the rights of the Broadway Surface R. Co. to run its cars on the city streets, the proceeds of such sale to be paid to the city, is in violation of the constitutional prohibition against changing the ownership of property without due process of law, it being an attempt to transfer such rights by mere force of the statute, without the consent or knowledge of their lawful owners.

Corporations—Dissolution by Act of Legislature—Winding up Affairs.—Application of Chap. 310 of Laws of 1886.—Chap. 310, Laws of 1886, providing that, whenever a corporation is dissolved by a legislative act, it shall be the duty of the attorney-general to bring a suit to wind up its affairs, is prospective in its operation, and has no application to the Broadway Surface R. Co., which was dissolved a few days prior to its passage.

Same—Receiver—Litigation of Claims—Invalidity of Statute.—A receiver of the property of a dissolved corporation, being the representative of the debtor, upon whom the duty rests to scrutinize the claims against the estate, and reject and defend against those he believes to be unfounded or illegal, cannot be impartial in a litigation between himself and creditors as to such claims; and hence a statute making such receiver the referee to take the proof of claims, and the judge to determine the materiality of evidence offered in their support, is in violation of the fundamental rule, in the administration of justice, that no man can be judge in his own case.

Same—Constitutional Law—Impairing Obligation of Contracts.—A provision in such a statute, making proof of the cost of the obligation, instead of the liability of the debtor as shown by the terms of the contract, the measure of the creditor's recovery, and requiring the creditor to accept payment of an obligation before maturity, violates the provision of the constitution against impairing the obligation of contracts.

Same—Vesting Property in Directors—Statute Transferring to Receiver—Invalidity.—Where, under the laws in force at the time of the dissolution of a corporation, the property vested immediately in its directors, who took as trustees for the stockholders and creditors, a subsequent statute providing for the appointment, without making the directors parties to the action, of a receiver of the property of the dissolved corporation, and for a transfer of its assets to him by force of the statute, after the title had become vested in the directors, is in violation of the constitutional prohibition against the taking of private property without due process of law.

Railways in Street—Lease of Franchise—Traffic Contracts.—The proviso contained in the New York Laws of 1884, chap. 252, sec. 15, to the effect that the section shall not be construed to authorize companies organized thereunder to lease their rights or franchises to any other company owning and operating a parallel road, is not intended to preclude such companies from making traffic contracts for the partial use of their respective roads beyond the line of parallelism.

APPEAL from Supreme Court, General Term, Third Department.

This action was brought by the people of the state of New York *v.* John O'Brien, as receiver of the Broadway Surface R. Co., the city of New York, the Broadway & Seventh Avenue R. Co., with which the Broadway Surface Co. made traffic contracts for the use of its road, and others, to determine the respective rights and liabilities of the Broadway Surface Co. and

its stockholders, mortgagees, creditors, and contractors. The appeal was taken by the plaintiff, and by the defendant, except the two railroad companies.

Charles F. Tabor, Denis O'Brien, and William A. Poste for the People.

Denis O'Brien for the receiver.

Alexander & Green (William C. Gulliver of counsel) for defendants McLean, Bird, Selmes, Pentz, and Richmond.

James C. Carter and Elihu Root for the Broadway & Seventh Avenue R. Co.

Edward Winslow Paige for defendant Palmer.

Nash & Kingsford and Chas. L. Jones (S. P. Nash of counsel) for bondholders and mortgagee.

RUGER, C.J.—It will not be unprofitable at the outset to recall some of the prominent incidents attending the origin and operation of the Broadway Surface R. Co., for the purpose of obtaining a clearer view of the situation of the parties, and their relation to the subject of the action. On May 13, 1884, that company filed articles of association, and became incorporated as a street-railroad company, under the provisions of chapter 252 of the Laws of 1884, a general act passed to authorize the formation of street-railroad corporations, pursuant to the mode introduced by the amendment to the Constitution of 1875. By such incorporation, the company became an artificial being, endowed with capacity to acquire and hold such rights and property, both real and personal, as were necessary to enable it to transact the business for which it was created, and allowed to mortgage its franchises as security for loans made to it, but having no present authority to construct or operate a railroad upon the streets of any municipality. This right, under the constitution, could be acquired only from the city authorities, and they could grant or refuse it at their pleasure. The constitution not only made the consent of the municipal authorities indispensable to the creation of such a right, but, by implication, conferred authority upon them to grant the consent upon such terms and conditions as they chose to impose, and upon the corporation the right to acquire it by purchase. The framers of the constitution, evidently treating the privilege as a valuable one, which should be disposed of for the benefit of the municipality, to those who would pay the highest price for it, gave the municipal authorities the exclusive right to grant the privilege, which had theretofore been exercised by the legislature alone, and authorized its acquisition by contract from such municipality. *In re Cable Co.*, 109 N. Y. 32; *Mayor, etc. v. Railroad Co.*, 49 N. Y. 657. The subsequent legislation of the state confirms this view, for at times it has

Origin and
operation of
Broadway road
reviewed.

provided that such right might be sold at auction, and by chapters 65 and 642 of the Laws of 1886 makes it obligatory upon the municipalities to dispose of such right by public auction to the highest bidder. Previous to December 5, 1884, this company applied to the municipality of New York for authority to lay tracks and run cars over Broadway from the Battery to Fifteenth street; and on that day, by resolution of the common council, the consent of the city was given, upon the terms and conditions prescribed in the resolution granting it, among which was the annual payment of a considerable sum of money to the municipality. It is conceded that the Broadway Surface Co. duly accepted the grant, and fully complied with and performed all of the terms and conditions provided therein to entitle it to acquire, construct, and operate its road. We know, not only from contemporary history, but from cases which have already reached this court, that serious questions have arisen with reference to the propriety of the means by which the corporators of the company obtained this consent from the municipal authorities; but they are not involved in this case, and have no bearing upon the questions presented for discussion by the record. The company subsequently obtained the favorable report of a commission duly appointed by the supreme court, in lieu of the consent of abutting property-owners, and the order of the court confirming the action of the commissioners. After the incorporation, the Broadway Surface Co. mortgaged its property and franchises as security for contemplated loans, and authorized its bonds to be put upon the market, for sale to the public generally, and they were largely purchased by investors, without notice of any defect in their origin or execution. It also made contracts with other street-railroad companies owning, respectively, lines of road connecting with the contemplated line of the Broadway Surface Co., and diverging therefrom to distant parts of the city, for the use of their several tracks by each other, for which it received a large present pecuniary consideration from each of said companies, besides the exchange of mutual benefits and accommodations. It is not disputed by the plaintiff but that, upon the entry of the order of confirmation referred to, the Broadway Surface R. Co. became vested with the right of constructing a railroad on Broadway, and running cars thereon, to as full an extent as it had power to acquire, or the state and city authorities had authority to grant. In the spring of 1885, the company caused its track to be constructed over the route authorized, and, from that time to the 4th day of May, 1886, when it was dissolved by an act of the legislature, in connection with connecting railroad companies, ran its cars over such roads and the connecting lines. On May 14, 1886, in an action between the people, as plaintiff, and James A. Richmond,

the former president of the Broadway Surface R. Co., as sole defendant, upon the application of the attorney-general, one John O'Brien was appointed receiver of the property formerly belonging to the Broadway Surface Co., by a justice of the supreme court of the third judicial district, in an *ex parte* order based upon the summons and complaint in that action, in pursuance of and under the authority alone of the provisions of chapter 310 of the Laws of 1886.

The present action was brought July 8, 1886, by the attorney-general, in the name of the people of the state, against the city of New York, the receiver of the Broadway Surface R. Co., and

Purposes of present action. numerous other corporations and persons alleged to have had dealings with such company, either as stockholders, mortgagees, creditors, or contractors, for the purpose of obtaining a judgment declaratory of the rights and liabilities of the several parties as affected by the dissolution of the corporation, determining the fact as to what were assets of the company and the extent of the interests of the several parties therein, and restraining the mortgagees, contractors, and others from taking legal proceedings to enforce their rights in and liens upon the property of the corporation. It is not claimed that the state has any legal interest in the determination of these questions, or that the receiver has not ample power at law to obtain possession of such assets as he may be entitled to, or to protect the property of the corporation from unlawful claims. It is claimed that the action is maintainable under the provisions of section 1 of chapter 310 of the Laws of 1886, by virtue of the provision making it the duty of the attorney-general, upon the dissolution of a corporation by legislative action, "immediately thereafter to bring a suit to wind up and finally settle and adjust the affairs of such annulled and dissolved corporation." The mode by which such settlement and adjustment of affairs shall be made is prescribed particularly in the act, and contemplates the appointment of a receiver, and proceedings by him to take possession of the property and convert it into money, to ascertain and determine the liabilities of the corporation to its creditors, and to distribute its assets among those entitled to them. The complaint shows that, previous to the commencement of this action, the attorney-general had brought a suit, in accordance with the statute, to wind up the affairs of the corporation; that a receiver had been appointed therein; and that such action was still pending, undetermined. It then proceeds to allege that, in consequence of various enumerated difficulties in obtaining possession of the property by the receiver, this action was brought "in aid of the former action, to prevent a multiplicity of suits, and to carry out the provisions of chapter 310 of the laws of 1886."

It is not easy to see on what theory such an action can be maintained. The state has no interest entitling it to intervene to prevent a multiplicity of actions between other parties. Neither does the action seem necessary or proper, in aid of the former action. The mode by which the provisions of chapter 310 are to be carried out are specially provided by that act through the instrumentality of a receiver, and it is not claimed that the receiver lacked power to litigate and settle any of the questions presented by this complaint. The receiver might, perhaps, have brought an action similar in character to this, and would have had a legal interest, if any, in the property to be affected by it; but the state has no such interest, and has no greater authority to intervene in the litigation of controversies between individuals and corporations than any other indifferent party. *People v. Booth*, 32 N. Y. 397; *People v. Ingersoll*, 58 N. Y. 13; *In re Railroad Co.*, 70 N. Y. 339; *People v. Railroad Co.*, 89 N. Y. 93; *People v. Railroad Co.*, 57 N. Y. 161.

The suit which the attorney-general was authorized to bring by section 1 of chapter 310 has been brought, and no reason is suggested why all of the objects of such a suit could not be attained in that action. His power to bring actions was exhausted by that suit, and it was not contemplated by the act, or necessary to its purposes, that he should bring successive actions to determine questions arising between the receiver and adverse claimants of the property represented by him. Those causes of action were by the act vested in the receiver, and how such questions can be judicially and finally determined in an action between a party representing no legal interest in them and such claimants it is difficult to understand. If all of the persons interested in a litigation come in as parties, either plaintiffs or defendants, and voluntarily submit their claims to the determination of the court, it is not doubted that they may be bound by an adjudication rendered in such action, but it is not claimed that all of the creditors, bondholders, or stockholders of the Broadway Surface R. Co. have been made parties, and it affirmatively appears that several of those who have appeared have objected to the right of the state to compel them to litigate their claims in this action. It might very well be held that the state was not a party aggrieved by the determination of the courts below, in such a sense as to entitle it to appeal therefrom.

It is not the duty of courts to entertain jurisdiction of actions brought for the purpose of determining abstract questions of law or of declaring the principles upon which contemplated controversies shall be determined, but they are created to deal with practical questions, in which the rights of parties are actually in-

State no authority to intervene.

Attorney-general's power to bring action exhausted by first suit.

involved, and are presented by the persons interested in their determination. It is claimed that this court held, in *People v. O'Brien*, 103 N. Y. 657, that the action was maintainable. We think that claim is unfounded. The question was not involved in the motion there considered. That was a motion to change the place of trial of the action. Whether the complaint stated a good cause of action or not could not have been properly considered or decided on such a motion. The action is certainly unusual, and is believed to be unprecedented in its scope and design, and, if held to lie at all, presents a strong and unfavorable contrast to the mode in which legal controversies are usually brought to the attention of judicial tribunals. Some members of the court, however, are of the opinion that the right of the people to maintain the action depends wholly upon the question of the constitutionality of chapter 310, referred to. Considering the magnitude of the interests involved, and the importance to the public generally of a speedy determination of the questions involving the right of operating a street railroad on Broadway, notwithstanding the dissolution of the corporation to which that right was originally granted, we refrain from disposing of the case upon this ground, and proceed to an examination of the principal questions involved.

Their determination involves an inquiry into the rights secured by the mortgagees and bondholders through the mortgages upon the property and franchises of the railroad company, the validity of the traffic contracts made by it with other street railroad corporations, and the effect which the legislation of 1886, comprised in chapters 268, 271, and 310, had upon such questions. In other words, we think the material question for discussion here is whether the franchise to maintain tracks and run cars on Broadway survived the dissolution of the corporation, and, if so, upon whom the right of administering its affairs devolved. Upon the trial of the action, a judgment was rendered in favor of the contention of all the defendants, except the receiver, to the effect that the mortgages were valid liens upon the property and franchises of the company, and survived the dissolution of the corporation; that the traffic contracts were made by authority of law, and could be enforced, notwithstanding the dissolution of the corporation; and that chapter 271 and parts of chapter 310 of the Laws of 1886 were unconstitutional, as violative of the restrictions of the fundamental law in relation to legislation impairing the obligation of contracts, and constituting a taking of "property without due process of law." The court also held that this action was maintainable in the name of the people; that a receiver of

**People v.
O'Brien does
not sustain
right.**

**Questions in-
volved.**

**Judgment and
conclusions of
court below.**

the property of the dissolved corporation had been lawfully appointed; that he was entitled to take possession of its property, and wind up its affairs, and that the plaintiffs were entitled to a perpetual injunction, restraining all of the defendants except the receiver from proceeding with actions already begun, or from instituting other proceedings or actions to enforce, maintain, or assert any of the claims, demands, or rights of action affecting in any manner the affairs, property, rights, and privileges of the Broadway Surface R. Co. which have been tried and determined in this action. Not only the plaintiff, but each of the defendants, except the Broadway & Seventh Avenue R. Co., appealed from this judgment to the general term. That court affirmed the judgment of the trial court. The plaintiff and all of the defendants, except the two railroad corporations, appeal from the judgment of affirmance to this court, and thus bring before us every determination involved in the judgment. A review of the judgment brings up for consideration propositions very grave in character, not only on account of the extent of the private interests involved, but because their determination will affect great public questions arising out of the limitations imposed by the constitution upon the legislative power over the property of corporations lawfully acquired under state statutes.

The statutes upon which the action is predicated confessedly assume the right and power of the legislature to wrest from the company its franchises, to transfer them to other persons, and bestow their value upon the donees of the state. The statutes contemplate the absolute destruction of the property of the corporation, and the loss of its value to the creditors who have made loans in good faith upon the security of mortgages upon such property; and this action is avowedly prosecuted to accomplish the purposes of the legislation. It is therefore urgently contended by the attorney-general that none of the franchises of the corporation survived its dissolution, and that the mortgages previously given thereon, as well as all contracts made with connecting street railroads for the mutual use of their respective roads, fell with the repeal, and could not be enforced. If it could be supposed for a moment that this claim was reasonably supported by authority, or maintainable in logic or reason, it would give grave cause for alarm to all holders of corporate securities. The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the constitution gives to property, and are subject to the arbitrary will of successive legislatures, to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice, as well as the traditions of the Anglo-Saxon race, in respect to the security of rights of prop-

Franchises
survived dis-
solution—Cor-
porate securi-
ties not in-
validate.

erty, that there is little reason to suppose that it will ever receive the sanction of the judiciary; and we desire in unqualified terms to express our disapprobation of such a doctrine. Whatever might have been the intention of the legislature, or even of the framers of our constitution, in respect to the effect of the power of repeal reserved in acts of incorporation upon the property rights of a corporation, such power must still be exercised in subjection to the provisions of the federal constitution. Considering the power which the state has to terminate the life of corporations organized under its laws, and the authority which its attorney-general has by suit to forfeit its franchises for misuse or abuse, and to regulate and restrain corporations in the exercise of their corporate powers, there is little danger to be apprehended from the overgrowth of power or the monopolistic tendencies of such organizations; but, whatever that danger may be, it is trivial in comparison with the wide-spread loss and destruction which would follow a judicial determination that the property invested in corporate securities was beyond the pale of the protection afforded by the fundamental law. It is not, perhaps, strange, in the great variety of cases bearing upon the subject, and the manifold aspects in which questions relating to corporate rights and property have been presented, that *dicta* couched in general language may be found, giving color to the plaintiff's claim; but we think that there are no reported cases in which the judgment of the court has ever taken either the franchises or property of a corporation from its stockholders and creditors, through the exercise of the reserved power of amendment and repeal, or transferred it to other persons or corporations, without provision made for compensation.

Among other claims made by the state, it is contended that the stated term of 1000 years, prescribed in its charter for the duration of the company, constitutes a limitation upon the estate granted, and that therefore the corporation took a limited estate only in its franchises; and that the rights reserved by the Revised Statutes (Laws, 1850, 1884) and the constitution, to alter, amend, and repeal the charters or laws under which corporations might be organized, also constituted a limitation upon the estate granted; and that the exercise of the right of repeal by the state accomplished the destruction of the corporation and the annihilation of all franchises acquired under its charter. It will be convenient, in the first instance, to consider the nature of the right acquired by the corporation under the grant of the common council with respect to its terms or duration. This is to be determined by a consideration of the language of the grant, and the extent of the interest which the grantor had authority to convey. We think this question has been decided,

Nature of
right acquired
by corporation
under grant of
council.

by cases in this court which are binding upon us as authority, in favor of the perpetuity of such estates. That a corporation, although created for a limited period, may acquire title in fee to lands or property necessary for its use, was decided in *Nicoll v. Railroad Co.*, 12 N. Y. 121, where it was held that a railroad corporation, although created for a limited period only, might acquire such title, and that, where no limitation or restriction upon the right conveyed was contained in the grant, the grantee took all of the estate possessed by the grantor.

The title to streets in New York is vested in the city, in trust for the people of the state, but under the constitution and statutes it had authority to convey such title as was necessary for the purpose to corporations desiring to acquire the same for use as a street railroad. The city had authority to limit the estate granted, either as to the extent of its use or the time of its enjoyment, and also had power to grant an interest in public streets for a public use in perpetuity which should be irrevocable. *Yates v. Van De Bogert*, 56 N. Y. 526. Grants similar in all material respects to the one in question have heretofore been before the courts of this state for construction, and it has been quite uniformly held that they are grants in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for the purposes of a street railroad. *People v. Sturtevant*, 9 N. Y. 263; *Davis v. Mayor, etc.*, 14 N. Y. 506; *Milhau v. Sharp*, 27 N. Y. 611; *Mayor v. Railroad Co.*, 32 N. Y. 261; *Railroad Co. v. Kerr*, 72 N. Y. 330. Other cases are also reported in the books, but it is deemed unnecessary to accumulate authorities on this point. In *Milhau v. Sharp*, Judge Selden said, with reference to a grant from the common council of New York in no material respect differing from this: "It amounted to an immediate grant of an interest, and, it would seem, of a freehold, in the soil of the street to the defendants. The rails, when laid, would become a part of the real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors, and assigns. I say perpetually, because there is no limitation in point of time to the continuance of the franchise, and no direct power is reserved to the corporation to terminate it. . . . The title to the rails, when permanently attached to the land, and such right in the land as may be requisite for their perpetual maintenance, are, therefore, granted to the defendants by the resolution." Judge Comstock, in *Davis v. Mayor, etc.*, said: "As the consideration for constructing the road, the ordinance clearly contemplates that it is, to become the private property of the associates. They alone will be entitled to place their cars upon it, and, within a maximum limit, they can charge what they please for the carriage of passengers. These rights are, in effect,

granted in perpetuity." In the case of Mayor, etc., v. Railroad Co., 32 N. Y. 272, it was said: "Assuming that the common council had power to make the grant, then its acceptance by Pearsall and his associates, signified by the execution of the agreement with the conditions annexed thereto, and the duties and obligations resulting therefrom, invested the latter with the right of property in the franchise, which the common council could not take away or impair by any subsequent act of its own." The resolution of the common council in this case expressly provided for traffic contracts, by which the Broadway & Seventh Avenue R. Co. should obtain a right to run cars over the tracks of the Broadway Surface Railroad; and no conditions upon the right granted to the Broadway Surface R. Co., in respect to the duration of such contract rights or otherwise, was imposed by the terms of the grant. It was clearly contemplated by its provisions that the rights granted should be exercised in perpetuity, if public convenience required it, by that corporation or those who might lawfully succeed to its rights. When we consider the mode required by the statutes and the constitution to be pursued in disposing of this franchise, the inference as to its perpetuity seems to be irresistible; for it cannot be supposed that either the legislature or the framers of the constitution intended to offer for public sale property the title to which was defeasible at the option of the vendor, or that such property could be made the subject of successive sales to different vendees as often as popular caprice might require it to be done. Neither can it be supposed that they contemplated the resumption of property which they had expressly authorized their grantee to mortgage and otherwise dispose of, to the destruction of interests created therein by their consent. We are therefore of the opinion that the Broadway Surface R. Co. took an estate in perpetuity in Broadway, through its grant from the city, under the authority of the constitution and the act of the legislature. It is also well settled by authority in this state that such a right constitutes property, within the usual and common signification of that word. Railroad Co. v. Kerr, 72 N. Y. 330; People v. Sturtevant, 9 N. Y. 263.

Same—Estate
in perpetuity
acquired.

When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country, the numerous laws adopted in the several states providing for their security and enjoyment, and the extent of litigation conducted in the various courts, state and federal, in which they have been upheld and enforced, there is no question but that, in the view of legislatures, courts, and the public at large, certain corporate franchises have been uniformly regarded as in-

Nature of cor-
porate fran-
chises—At-
tributes of
property.

destructible by legislative authority, and as constituting property in the highest sense of the term. It is, however, earnestly contended for the state that such a franchise is a mere license or privilege, enjoyable during the life of the grantee only, and revocable at the will of the state. We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country. The laws of this state have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested them with the attributes of property generally. We will refer to a few of the statutes on this subject, from which the implication arises not only that the state intended to invest these franchises with the character of property, but also to enable their mortgagees, purchasers, and assigns to enjoy their use under an indefeasible title in perpetuity. Thus, railroad corporations have been authorized to contract with other corporations for a qualified transfer of such franchises for terms unlimited, except by the agreement of the parties (chapter 218, Laws 1839; section 2, c. 843, Laws 1872; section 15, c. 252, Laws 1884); to pledge them, by way of mortgage, as security for loans (subd. 10, § 28, c. 140, Laws 1850); to consolidate with other companies owning connecting and continuous lines of railroad, and continue the use of such franchises under the name of their successors (chapter 108, Laws 1875; see *Shields v. Ohio*, 95 U. S. 319). Mortgagees and others have been authorized to purchase such franchises, upon mortgage sale and otherwise, and afforded the right to organize so as to enjoy their use thereafter. Section 1, c. 444, Laws 1857; chapters 469, 710, Laws 1873; chapter 113, Laws 1880; chapter 430, Laws 1874. Purchasers upon a mortgage or execution sale have been authorized to form associations for the purpose of continuing the operation of such railroad, with all its powers, privileges, and franchises. Section 1, cc. 469, 710, Laws 1873; section 1, c. 282, Laws 1854. The sale of such franchises has been authorized by the municipality where located to parties proposing to build street railroads. Const. Amend. 1875; section 7, c. 252, Laws 1884; chapters 65, 642, Laws 1886. And, by section 15 of the act under which this corporation was organized, such companies were expressly permitted to lease or transfer their rights and franchises to other street railroad corporations. Indeed, it is a matter of public history that one half of the railroads of the state are now operated by organizations other than those to whom the franchises were originally granted, notwithstanding their dissolution, through transfers effected by the foreclosure of mortgages and otherwise. The statutes cited, as well as others not specially referred to, indicate the general policy of the state to render such interests independent of the

life of the original corporation, and transferable as property, by means of judicial proceedings and otherwise, under certain restrictions not pertinent to our present purpose particularly to consider. *People v. Railroad Co.*, 89 N. Y. 84. In *Mayor, etc., v. Railroad Co.*, 32 N. Y. 261, Judge Brown said: "The rights of municipal corporations to property in lands and its usual incidents, and to create ferries and railroad franchises, are quite distinct and separate from their duties as legislatures, having authority to pass ordinances for the control and government of persons and interests within the city limits. The latter are powers held in trust, as all legislative powers are, to be used and exercised for the benefit and welfare of the whole community, while the former are property, in the ordinary sense, to be acquired and conveyed in the same manner as natural persons acquire and transfer property." The same learned judge said, in *Railroad Co. v. Railroad Co.*, 32 Barb. 364: "The grant to the City R. Co., and its acceptance on the conditions annexed, with the duties and obligations and large expenditures resulting therefrom, would seem, therefore, upon the principles I have endeavored to state, to invest the company with the right of property in the franchise, of which it cannot be deprived without its consent or against its will." It was held by this court, in *Langdon v. Mayor, etc.*, 93 N. Y. 129, that a grant from the city of land to be used as a wharf carried with it, as a necessary incident and appurtenance, a right of way for vessels over adjoining waters to the wharf, and that, under such grants, the property granted can only be resumed by the grantor when needed for public use, by the exercise of the right of eminent domain. This court also held, in *People v. Railroad Co.*, 89 N. Y. 75, that, upon a foreclosure of the property and franchises of a railroad corporation, an individual could lawfully become their purchaser, and could hold and transfer them to any corporation having or acquiring the right to exercise such franchises. In *Railroad Co. v. Kerr*, 72 N. Y. 330, it was held that the right of a street railroad company in the use of a street for the purpose of its business was a property right, subject to condemnation for public use. As we have already seen, the cases of *People v. Sturtevant*, *Mayor v. Railroad Co.*, *Davis v. Mayor*, and *Milhau v. Sharp*, hereinbefore referred to, sustain the same views. The case of *Railroad Co. v. Delamore*, 114 U. S. 501, is directly in point. There the franchise, as here, was acquired by the corporation from the municipal authorities of a city, under general laws authorizing the formation of street railroad corporations. It was held: "Where there has been a judicial sale of railroad property under a mortgage, authorized by law, covering its franchises, it is now well settled that the franchises necessary to the use and enjoyment of the railroad pass to the purchase. . . . It follows that, if the

franchises of a railroad corporation, essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property upon the bankruptcy of the company carries the franchises, and they may be sold and pass to the purchaser at the bankruptcy sale." In *Railroad Co. v. Commissioners*, 112 U. S. 619, it was said: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders or the purchasers at a foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as a road."

These rights of property having been acquired and created under the express sanction and authority of the state, it remains to inquire whether they were defeasible and subject to be taken away through the exercise of any power reserved by the state to alter, amend, and repeal laws or charters. The reservations applying to this case are claimed to be as follows: (1) Sect. 1, art. 8, tit. "Corporations, How Created" (Const. 1846), providing that "all general laws and special acts passed pursuant to this section may be altered from time to time or repealed;" (2) section 8, tit. 3, c. 18, of the Revised Statutes (7th Ed.), providing that "the charter of every corporation that shall be granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature;" (3) section 48, c. 140, Laws 1850, providing that "the legislature may at any time annul or dissolve any incorporation formed under this act, but such dissolution shall not take away or repair any remedy given against any such corporation, its stockholders, or officers, for any liability which shall have been previously incurred;" and (4) chapter 282, Laws 1884, under which this corporation was organized, giving it all the powers and privileges granted, and subject to all of the liabilities imposed by chapter 140, Laws 1850, and the several acts amendatory thereof, and further providing that "the legislature may at any time alter, amend, or repeal this act." Section 19. The constitution of 1846 for the first time introduced restrictions upon the power of legislatures to grant special charters, and required that provisions for incorporations, save in exceptional cases, should thereafter be made by general laws. The obvious intent of the constitutional reservation was to remove any doubt as to the power of the legislature to amend or repeal the laws, whether general or special, authorized by that instrument for the formation of corporations, and seemed to leave the provisions of the Revised Statutes in relation to reserved power over charters in full force and effect. It will be observed that the constitution and the act of 1884 provide specially for

**Rights of state
over fran-
chises—Sta-
tutory and con-
stitutional
provisions.**

the amendment and repeal of statutes alone, but the Revised Statutes and the act of 1850 are addressed to the subject of the annulment and repeal of charters created under such statutes. It seems to us that these provisions relate to different subjects, viz., the repeal of laws, and the annulment of charters formed under such laws; and that the power to do one does not naturally or properly include the power to do the other. *Railroad Co. v. Brownell*, 24 N. Y. 345. Certainly, the repeal of a law authorizing corporations would not destroy organizations formed under it, nor would the annulment of a charter affect the law under which it was created. Neither does it seem reasonable to suppose, while taking away the power of the legislature to create corporate bodies, the constitution intended to confer power to destroy them, thus enabling them to accomplish indirectly that which they were precluded from doing directly. It must be assumed that the framers of the constitution, as well as the legislature, used the language employed by them intelligently, and according to its common and customary signification, and, when they spoke of the annulment and repeal of acts and laws, did not intend to embrace charters as well. These two subjects have frequently been the occasion of legislative actions, and, since the restrictions upon the powers of the legislature to grant special charters, there is no reason to suppose that they did not use the language employed in its literal sense, and especially so when both subjects were immediately within the contemplation of the law-makers.

In considering this question, the provisions of the Revised Statutes may be laid out of view; for, if they contain any broader power than the act of 1850, they must be deemed to have been repealed by the provisions of the latter act, as inconsistent therewith. The reservations, therefore, which apply to this case are contained in the acts of 1850 and 1884, which constitute a part of the railroad charter. These acts should be read and construed together, and, as thus considered, provide that the legislature may at any time alter, amend, and repeal this act, and may also annul and dissolve charters formed thereunder; but such dissolution shall not take away or impair any remedy against such corporation, its officers and trustees, for any liability previously incurred. The contract proved between the corporation and the state was intended, in respect to a repeal of the charter, to survive the dissolution of the corporation, and to determine the rights of parties interested in the property in the event of dissolution. By virtue of this contract, the corporation secured rights subject to be taken away under certain restrictions, and protected itself from any consequences following a repeal of its charter, except those expressly agreed

Effect of repeal of charter on franchise of corporation — Reserved power of state.

upon. But, even if it be conceded that the constitutional provisions place the right to repeal charters, as well as laws, beyond the power of legislatures to waive or destroy, the question still remains, as to the effect of such a repeal upon the franchises of the corporation, whether it contemplates anything more than the extinction of the corporate life, and consequent disability to continue business and exercise corporate functions after that time, or has a wider scope and effect. It may be assumed in this discussion that the authority of the legislature to repeal a charter, if it has expressed its intention to reserve such power in its grant, constitutes a valid reservation. Parties to a contract may lawfully provide for its termination at the election of either party, and it may therefore be conceded that the state had authority to repeal this charter, provided no rights of property were thereby invaded or destroyed. In speaking of the franchises of a corporation, we shall assume that none are assignable except by the special authority of the legislature. We must also be understood as referring only to such franchises as are usually authorized to be transferred by statute, viz., those requiring for their enjoyment the use of corporeal property,—such as railroads, canals, telegraph, gas, water, bridge, and similar companies,—and not to those which are in their nature purely incorporeal and inalienable,—such as the right of corporate life, the exercise of banking, trading, and insurance powers, and similar privileges. The franchises last referred to being personal in character, and dependent upon the continued existence of the donee for their lawful exercise, necessarily expire with the extinction of corporate life, unless special provision is otherwise made. *People v. Railroad Co.*, 89 N. Y. 84; *Metz v. Railroad Co.*, 58 N. Y. 61. In the former class it has been held that, at common law, real estate acquired for the use of a canal company could not be sold, on execution against the corporation, separate from its franchise, so as to destroy or impair the value of such franchise (*Gue v. Canal Co.*, 24 How. 257); and, by parity of reasoning, it must follow that the tracks of a railroad company, and the franchise of maintaining and operating it in a public street, are equally inseparable, in the absence of express legislative authority providing for their severance. The statute of our state authorizing the sale of the franchise and property of a railroad company on execution seems to recognize the indissolubility of the connection between the corporeal property and its incorporeal right of enjoyment. It is also to be observed that in none of the provisions for repeal in this state is there anything contained which purports to confer power to take away or destroy property, or annul contracts; and the contention that the property of a dissolved corporation is forfeited, rests wholly upon what is claimed to be the necessary consequence of the

extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his. *Mumma v. Potomac Co.*, 8 Pet. 285. The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irrevocable, or to undo what has been lawfully done, under power lawfully conferred. *Butler v. Palmer*, 1 Hill, 335. The authorities seem to be uniform, to the effect that a reservation of the right to repeal enables a legislature to effect a destruction of the corporate life and disable it from continuing its corporate business. *People v. Railroad Co.*, 70 N. Y. 569; *Philips v. Wickham*, 1 Paige, 590; and a reservation of the right to alter and amend, confers power to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by the federal constitution upon legislation impairing the obligation of contracts. *Munn v. Illinois*, 94 U. S. 123. We think no well-considered case has gone further than this, while, in many cases, such power has been expressly held to be limited to the effect stated. In the language of Chief Justice Marshall in *Fletcher v. Peck*, 6 Cranch, 135: "If an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates; and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights." It would seem to be quite obvious that a power existing in the legislature by virtue of a reservation only, could not be made the foundation of an authority to do that which is expressly inhibited by the constitution, or afford the basis of a claim to increase jurisdiction over the lives, liberty, or property of citizens, beyond the scope of express constitutional power.

Since the decision of the celebrated *Dartmouth College Case*, 4 Wheat. 518, the doctrine that a grant of corporate powers by the sovereign to an association of individuals for public use constitutes a contract within the meaning of the federal constitution prohibiting state legislatures from passing laws impairing its obligations, has, although sometimes criticised, been uniformly acquiesced in by the courts of the several states as the law of the land, and may be regarded as too firmly established to admit of question or dispute. *People v. Sturtevant*, *supra*; *Milhau v. Sharp*, *supra*; *Railroad Co. v. Railroad Co.*, *supra*. The intimation by Judge Story in that case, that the

rule might be otherwise if the legislature should reserve the power of amending or repealing it, led to the adoption by the legislatures of the various states of the practice of incorporating such reservations in acts of incorporation. Whatever may be the effect of such reservations, it is immaterial whether they are embraced in the act of incorporation or in general statutes or provisions of the constitution. In either case, they operate upon the contract according to the language of the reservation. 1 Mor. Priv. Corp. § 464. It is manifest, therefore, that, in the absence of such reserved power, legislatures have no authority to violate, destroy, or impair chartered rights and privileges, or power over corporations, except such as they possess by virtue of their legislative authority over persons and property generally.

Limita to reserve power to repeal and amend.

It is obvious that this reserved power does not, in any sense, constitute a condition of the grant, and cannot have effect as such, but is simply a power to put an end to the contract, with such effect upon the rights of the parties thereto as the law ascribes to it. Sinking Fund Cases, 99 U. S. 748; Tomlinson v. Jessup, 15 Wall. 457. In speaking of the exercise of this power by congress in the Sinking Fund Cases, Chief Justice Waite says: "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made, . . . Whatever rules congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment. In doing so, it cannot undo what has already been done, and it cannot unmake contracts that have already been made; but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking fund to meet it at maturity. Not having done so at first, it cannot now, by direct legislation, vacate mortgages already made under the powers originally granted, nor release debts already contracted." The judges dissenting in that case contended that the reserved power could not be construed as authorizing the alteration, violation, or nullification of any of the material provisions of the grant, but should be held to mean simply a reservation of the power to legislate, freed from the restrictions

imposed by the constitutional provisions against legislation impairing the obligations of contracts. Mr. Justice Bradley said: "The reserved power in question is simply that of legislation, to alter, amend, or repeal a charter. This is very different from the power to violate or to alter the terms of a contract at will. A reservation of power to violate a contract, or alter it, or impair its obligation, would be repugnant to the contract itself, and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute, is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles; but, interpreted as the reservation of the right to violate an executed contract, it is not sustainable." This dissent proceeded upon the ground that the acts of congress under consideration changed some of the essential features of the contract, and were, therefore, void, as being obnoxious to the provisions of the constitution for the protection of lives, liberty, and property. The majority of the court held, however, that such acts were simply an exercise of the power of congress to regulate the internal administration of the affairs of a corporation, which, to a certain extent, it was unanimously agreed that it possessed. There was no dispute or disagreement as to the correctness of the rule stated, that the power of amendment and repeal was a restricted power, limited by the provisions of the constitution. An interpretation conferring the power of violating a contract at will upon one of its parties, under a clause authorizing its amendment or repeal, would seem to be inconsistent with any reasonable notion of the nature of such an instrument, and beyond the power of parties lawfully to create. If it is possible to conceive the idea of a repealable grant, certainly such a grant, accompanied with power to convey or pledge the interest granted, must, on the execution of the power, necessarily preclude a resumption by the grantor of the subject of the grant, or any right of property acquired under it. An express reservation by the legislature of power to take away or destroy property lawfully acquired or created under authority conferred by a charter would necessarily violate the fundamental law, and be void, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly would be equally ineffectual and void.

In *People v. Trust Co.*, 82 N. Y. 287, the question was raised that a dissolved corporation was discharged from the obligation to pay rent accruing upon a lease subsequent to its dissolution. Judge Rapallo said: "This denial is not founded upon the allegation of any payment, release, or surrender, or anything affecting the merits of the claim, but upon the sole ground that by the dissolution of the corporation the lease was terminated, and the

Property of
corporation
not affected by
dissolution.

covenant to pay rent ceased to be obligatory. We do not regard the dissolution as having any such effect. Under the statutes of this state, on the dissolution of a corporation its assets become a trust fund for the payment of its debts, and these include debts to mature, as well as accrued indebtedness, and all engagements entered into by the corporation which have not been fully satisfied or cancelled." In *Com. v. Essex Co.*, 13 Gray, 239, Justice Shaw said: "When, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." See *Railroad Co. v. Brownell*, 24 N. Y. 345. The case of *City of Detroit v. Plank-Road Co.*, 43 Mich. 140, is not only in point, but entitled to high consideration, on account of the distinction as a constitutional lawyer attained by the learned judge who wrote the opinion of the court. The question was whether the legislature had power to compel the defendant to remove its toll-gates from within the city limits after they had been lawfully placed there under its provisions of its charter. Judge Cooley says: "It cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times, such an act was recognized as pure tyranny, and it has been forbidden in England ever since *magna charta*, and in this country always. It is immaterial in what way the property was lawfully acquired—whether by labor in the ordinary avocations of life, by gift, or descent, or by making a profitable use of a franchise granted by the state; it is enough that it has become private property, and it is thus protected by the 'law of the land.'" And, finally, upon this branch of our subject, we are unable to see why section 48 of the law of 1850 does not express the rule by which the question under discussion must be determined. That section is expressly made a part of the contract between the state and corporations organized thereunder, and specially provides for the effect which an exercise of the reserve power of repeal by the state shall have upon the franchises of the company. It shall not impair any remedy existing against the corporation, its directors, or officers, upon a liability previously incurred. This was the contract under which the dissolved corporation issued its stock, mortgaged its franchises, entered into traffic engagements, and contracted debts. Creditors, contractors, and stockholders had a right to rely upon the promise of the state that the annulment of the corporate charter should not affect the remedies existing in their favor against the corporation, and this promise is a contract protected by the provisions of the federal constitution. In the absence of any constitutional

provision prescribing the effect of such repeal, it was competent for the legislature to declare what that should be, and for the state to contract with reference to such a declaration. The right of repeal, as provided by the constitution, is fully recognized by the act of 1850, and the effect of the exercise of the power upon the rights of parties affected thereby is clearly defined. We are therefore of opinion that the statute not only prescribes the rule, creates the contract, and regulates the rights of the parties upon the exercise by the state of the power of repeal, but it also correctly formulates the principle of law applicable to the situation.

We think it necessary to refer only to the leading cases cited by the plaintiffs' attorney in support of his argument, and are of the opinion that they are plainly distinguishable from the case under consideration. That of *Greenwood v. Freight Co.*, 105 U. S. 13; s. c., 9 Am. & Eng. R. R. Cas. 526, was an action by a stockholder in the Marginal Co. against the Union Freight Co. and others, to obtain an injunction restraining the latter company from taking possession of the railroad tracks of the former company, after its dissolution by legislative action, and running cars thereon. The Marginal Co. had refused to assert its rights, and the stockholder was therefore allowed to bring his suit to protect his interest in its property. Judge Miller expressly says in that case: "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means in their power. The rights of the shareholders of such a corporation to their interests in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights." It was further held that, so far as the law then under consideration authorized one corporation to take and use the property or franchises of another, it was sustainable in that case, under the provisions requiring compensation to be made therefor under the power of eminent domain. Neither has the case of *People v. Insurance Co.*, 91 N. Y. 174 any bearing upon the questions involved in this discussion. It was held in that case that contracts for personal services contemplated the continued existence of the parties, and when either of them died it necessarily effected a termination of such contracts. So, too, cases depending upon the effect of conditions in a grant to the creation of corporate life, or the acquisition of property rights thereunder, are, for obvious reasons, foreign to the questions involved here. Here the grantee has performed every

Authorities
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condition essential to its creation as a corporate being and its capacity to acquire and hold property, and the only question is as to the effect of a power to extinguish the corporate life reserved in its charter upon its property rights. In *Railroad Co. v. Casey*, 26 Pa. St. 301, the question arose under a statute which specially provided that the state might resume all rights granted, in case of an abuse or misuse of the powers granted to the corporation. Upon an alleged abuse of the powers granted, the legislature repealed the charter, and resumed the subject of the grant. The corporation forfeited its rights by its voluntary act. The reservation of the charter was expressly made a condition subsequent. The case was between the representative of the state and the railroad corporation, and no rights of creditors, mortgagees, or stockholders were involved in its decision. It also appears by the case that the state and the corporation had settled their controversy by compromise during the pendency of the litigation, and it can hardly be said to have involved any practical question. We are therefore of the opinion that the Broadway Surface Company took an indefeasible title in the land, necessary to enable it to construct and maintain a street railroad in Broadway, and to run cars thereon for the transportation of freight and passengers, which survived its dissolution.

We are thus brought to the question of the right of succession to the property of a dissolved corporation, in the absence of any provision in the act of dissolution, providing for such an event. Sections 9, 10, tit. 3, c. 18, pt. 1, Rev. St. pp. 1531, 1532 (7th Ed.), seem to furnish a conclusive solution to the inquiry. They read as follows: "Sec. 9. Upon the dissolution of any corporation created or to be created, and unless other persons shall be appointed by the legislature, or by some court of competent authority, the directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain after the payment of debts and necessary expenses." "Sec. 10. The persons so constituted trustees shall have authority to sue for and recover the debts and property of the dissolved corporation, . . . and shall be jointly and severally responsible to the creditors and stockholders of such corporation, to the extent of its property and effects that shall come into their hands." From these sections it would seem that, upon the dissolution of this corporation, its remaining trustees became vested with the title of its property, and responsible to its creditors and stockholders for the value thereof. By opera-

Succession to
property of
dissolved cor-
poration.

tion of law, a vested right of action accrued to all creditors and stockholders, immediately on the dissolution, against such trustees, for the value of all property which did or might by the exercise of reasonable diligence come into their hands. This was a liability which, after it once attached, was beyond the constitutional power of the legislature to release or discharge. *Dash v. Van Kleeck*, 7 Johns. 477. The evidence is undisputed that, upon the dissolution declared by the legislature, the trustees took possession of the railroad property, and surrendered its operation to the mortgagees of such railroad. This, in the absence of any objection on the part of creditors or stockholders, they had undoubted authority to do, and the possession of such mortgagees thereafter was the possession of such trustees. They undoubtedly became liable for the value of such property to creditors and stockholders, by virtue of such possession; and their authority to administer the assets of the corporation for the purpose of discharging such liability became fixed by the law existing at the time the liability was incurred. The cases in this state fully support these propositions. As was said by the chancellor in *Kane v. Bloodgood*, 7 Johns. Ch. 128, "the reasonable construction of the act is that the trustees succeeded to all the rights and privileges of directors, and to the same means of defence." In *McLaren v. Pennington*, 1 Paige, 102, it was held, as stated in the headnote, that, "where an act of incorporation is repealed, all the property and rights of the corporation become vested in the directors then in office, or in such persons as by law have the management of the business of the corporation, in trust for the stockholders and creditors, unless the repealing law provides for the appointment of other persons than the officers of the corporation as trustees." In *Heath v. Barmore*, 50 N. Y. 305, Judge Rapallo said: "Under the provisions of 1 Rev. Laws, 248, and 1 Rev. St. p. 600, §§ 9, 10, upon the dissolution of a corporation, the directors or managers at that time become trustees of its property (unless some other custodian is appointed), for the purpose of paying the debts of the corporation, and dividing its property among its stockholders; and these provisions apply as well to the real as to the personal property of corporations. Consequently, where lands are conveyed absolutely to a corporation having stockholders, no reversion or possibility of a reverter remains in the grantor." *Allen, J.*, in *Bank v. Walker*, 66 N. Y. 428, speaking of the ownership of property, and the property rights of a corporation, said: "During the life of the corporation the body corporate was the legal owner, and, upon the expiration of the charter, the legal title vested in the trustees in office at the time, in trust for the creditors and stockholders." There can be no valid distinction between property held in trust and that

owned by individuals, in respect to the protection afforded to it by the constitution. The reason for its protection is equally strong in either case, and the inviolability of the title is equally beyond the reach of legislative action. *Dartmouth College Case, supra.*

It then remains for us to consider the validity of the provisions of chapters 271, 310, of the Laws of 1886. We are fully impressed with the importance of this question, and the well-settled principles of construction which require every statute to be so interpreted as to uphold its constitutionality, if that may be done by a fair and reasonable interpretation of its language. Another rule, equally well settled, precludes courts from inquiring into the motives of legislatures in making laws, and to consider them simply with reference to their legal effect upon the rights of persons subjected to their operation. If, however, upon such examination, it is found that constitutional rights will be invaded by the operation of the statute, it is the duty of courts to protect them by declaring the invalidity of the statute. Upon such examination, we are of the opinion that chapter 271 of the Laws of 1886 is unconstitutional and void. Its provisions show a naked and undisguised attempt to take away from the Chapter 271 of laws of 1886 unconstitutional. Broadway Surface Co., and its stockholders and creditors, its property, and bestow the benefit thereof upon the municipality of New York. The act attempts to preserve the validity of the consents held by the corporation, notwithstanding its dissolution, and directs their sale and transfer to the purchaser, and the payment of the purchase-price to the city. These consents were the muniments of title to the enjoyment of the rights acquired thereunder by the railroad corporation, and could not be lawfully retained in existence, or transferred, except by its consent, manifested in some of the ways provided by law. Their possession by any lawful transferee would entitle him to the exercise and use of the rights thereby conferred. The attempt to transfer them to a third party by the mere force of the statute, without the consent or knowledge of their lawful owners, was an effort to change their ownership without due process of law. *Parker v. Browning*, 8 Paige, 388. Such legislation has been frequently and emphatically condemned. *Taylor v. Porter*, 4 Hill, 147; *Wynehamer v. People*, 13 N. Y. 434; *Westervelt v. Gregg*, 12 N. Y. 202; *Kitbourn v. Thompson*, 103 U. S. 168. In speaking of the reserved power to alter, amend, and repeal laws authorizing incorporations, in *People v. Railroad Co.*, 70 N. Y. 570, Judge Earl says: "Under this reserved power, the legislature may impose upon railroad corporations such additional restrictions and burdens as the public good requires. It may not confiscate property, but it cannot

be doubted that it may do all that is required by the act of 1874." Judge Thompson said, in *Dash v. Van Kleeck*, 7 Johns. 477: "It is repugnant to the first principles of justice, and the equal and permanent security of rights, to take, by law, the property of an individual, without his consent, and give it to another." The main argument presented to maintain the constitutionality of this act is the assertion that these consents do not constitute property, within the usual signification of the term. We have considered that question, and do not agree with the claim. In view of the fact that the statute expressly contemplates their sale, transfer, and acquisition by a purchaser, it would seem unnecessary to go further to prove the fallacy of such a contention.

These remarks apply with equal force to chapter 310. The plaintiff has argued the case upon the assumption that the chapter referred to applies to the Broadway Surface R. Co., and should control the proceedings to wind up its affairs. That company was, however, dissolved on January 4th, and the act now under consideration was not passed until January 11th thereafter, and could not have retroactive effect, unless its language expressly required it. We can see no ground for such a contention, unless we look beyond the language of the act, and speculate as to the motives of the legislature in passing it. The act does not purport, in terms, to have a retroactive operation, and it is contrary to settled principles to give it such, unless there is something in the language of the act requiring this to be done. Section 1 provides: "Whenever any corporation organized under the laws of this state shall be annulled and dissolved by an act of the legislature, it shall be the duty of the attorney-general . . . to bring a suit . . . to wind up the affairs of the corporation." This language looks plainly to prospective cases arising under the act, and those only, and there is nothing in the body of the act to show that the legislature intended it to apply to a dissolution already accomplished. The character of a statute is to be determined by its provisions, and not by its title (*People v. McCann*, 16 N. Y. 58), but when its language is ambiguous and doubtful, resort may be had to its title, and the occasion of its enactment, to explain an ambiguity in its terms. There is no ambiguity in the terms of this act, and nothing to indicate an intention to give it retroactive operation. The application of the act to the Broadway Surface Co. can be sustained only upon the theory that such act applies to all corporations whatsoever theretofore dissolved by legislative act, however remote in point of time such dissolution may have been effected. Whether there are such cases or not we are not informed, but we are invited to adopt a rule which would relate back and

cover such cases, if they exist. We think such a decision would conflict with settled rules of construction. In *Railroad Co. v. Van Horn*, 57 N. Y. 473, it was held that a legislative intent to violate the constitution will not be assumed, nor will a law be so construed as to give it a retroactive effect, when it is capable of any other construction; and that, if all of its language can be satisfied by giving it prospective operation only, that construction will be given to it. In the case of *Dash v. Van Kleeck*, *supra*, it was decided that it is a principle of universal jurisprudence that laws, civil and criminal, must be prospective, and cannot have a retroactive effect; and in *Benton v. Wickwire*, 54 N. Y. 229, the court declared that neither original statutes nor amendments can have any retroactive effect unless, in exceptional cases, the legislature so declare. See also *People v. Supervisors*, 43 N. Y. 130; *People v. McCall*, 94 N. Y. 587; *Railroad Co. v. Van Horn*, 57 N. Y. 473.

We do not deny the power of the legislature to give retroactive operation to a statute in some cases, but we believe that to have such effect a statute should declare its purpose in plain and unmistakable language, and that so unusual a signification should not be attributed to it by resorting to vague and equivocal inferences, which have no support in the language employed. Such an interpretation would most emphatically be forbidden when it would interfere with vested rights. If we were at liberty to inquire into the circumstances under which this act was passed, and its connection with other legislation of the same period, we might conjecture that the legislature designed it to apply to the *Broadway Surface R. Co.*; but it has not so expressed itself in the act, and the rules of construction to which we have referred forbid us from supplying the language necessary to give it such effect. *Benton v. Wickwire*, 54 N. Y. 226. But, assuming that the act was intended to apply, and retroactive effect be given to it, we are of opinion that its material provisions are open to many serious objections, which cannot be obviated or reconciled with the provisions of the fundamental law. A receiver is the representative of the debtor. It is his duty to scrutinize the claims made against the estate, and reject and defend against those he believes to be unfounded or illegal. He cannot be impartial in a litigation between himself and creditors as to such claims. A law, therefore, which makes such a party the referee to take the proof of claims, and the judge to determine the materiality of evidence offered in their support, violates a fundamental rule in the administration of justice. No man can be a judge in his own case, and it is immaterial whether he is a party in his own right, or as trustee of an express trust. In either event, he is a party to the action, interested therein, and

Retroactive
operation of
statute.

precluded from acting in a judicial capacity in the determination of such a case. *Nemo debet esse judex in propria causa.*

This law is unconstitutional, also, because it makes proof of the cost of the obligation the measure of the creditor's recovery, instead of the liability of the debtor, as shown by the terms of his contract. And, again, it requires the creditor to accept payment of an obligation before maturity. The time of payment of a pecuniary obligation is a material provision in such contracts, and we knew of no authority to require a creditor to accept payment in advance, any more than one to compel such payment by the debtor. Each party has the right to stand on the letter of his contract, and perform it according to its terms.

But an objection to this act even more serious than those considered is found in the provision for the appointment of a receiver of the property of the dissolved corporation, and the transfer of its assets to him by force of the statute, after the title thereto had become vested in its directors. It will not be claimed that the appointment of such a receiver by the court, in an action against a stranger, without notice to the trustees, in the absence of the authority conferred by chapter 310, would confer upon him title to property previously vested in others. *Parker v. Browning, supra.* We cannot see how this case differs from the one supposed. The only authority the court had for making the appointment was derived wholly from the provisions of this act, and the court was not thereby invested with any judicial authority or discretion, except that of designating the holder of the title assumed to be transferred by the act. The court has, by virtue of its general jurisdiction over trusts, authority to appoint to a vacant trusteeship, and, perhaps, for cause, to remove fraudulent, dishonest, or incompetent trustees, and appoint others to perform the duties of the trust, in order to avoid a failure thereof; but we know of no authority for a court to appoint a receiver of property vested in trustees, without cause, and without notice to them, or opportunity afforded to defend their title and possession. As was said by Judge Earl, in *Stuart v. Palmer*, 74 N. Y. 184, "Due process of law requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing and an opportunity to be heard are absolutely essential. We cannot conceive of due process of law without these." And the chancellor had previously said, in *Verplanck v. Insurance Co.*, 2 Paige, 450: "Another fatal objection to the regularity of these proceedings is that the appellants were deprived of the possession of their property without having an opportunity of being heard, and without any sufficient cause for such summary proceeding. By

the settled practice of the court in ordinary suits, a receiver cannot be appointed *ex parte*, before the defendant has had an opportunity to be heard in relation to his rights." *Devoe v. Railroad Co.*, 5 Paige, 521; *Ferguson v. Crawford*, 70 N. Y. 256. As we have seen, the property of this corporation vested in the persons who were its directors at the time of its dissolution. They took it as trustees for stockholders and creditors, and were not made parties to the action in which the receiver was appointed. No legislation can authorize the appointment of a receiver of the property of A, in an action against C, without violating the provisions of the constitution in relation to the taking of property without due process of law. That the legislature might amend the provisions of the Revised Statutes in relation to the devolution of property of dissolved corporations is indisputable; and, if it had done so in the act of dissolution, it would undoubtedly have prevented the vesting of the property in the trustees; but this it did not do, and it had no right, by mere force of legislative enactment, to take vested property from one individual or trustee, and give it to another. *McLaren v. Pennington*, *supra*; *Dartmouth College Case*, *supra*. These conclusions must result in the condemnation of the scheme by which it was attempted to wind up the affairs of the Broadway Surface R. Co.; as the provision for bringing an action by the attorney-general to wind up its affairs was incidental merely, and so intimately connected with the general plan of the scheme that it cannot be supposed it would have been enacted except in connection with the other provisions of the act. We therefore think this law is obnoxious to the objection that it assumes to take property without due process of law and impairs the obligation of contracts.

The questions as to the rights of the several parties under the traffic contracts are not before us in such form as to authorize us to pass definitely upon them; but we may properly, in this action, determine their validity so far as any objections are made to them by the plaintiff in this action. The plaintiff has not alleged any want of power on the part of the defendant corporations to run cars over the Broadway Surface Railroad under their respective charters, and that question must be left until the attorney-general arraigns them in a direct action for usurpation. *People v. Railroad Co.*, 89 N. Y. 93; *Denike v. Cement Co.*, 80 N. Y. 599. It is claimed that the contract with the Broadway & Seventh Avenue Railroad is void because it is made with a company owning a parallel railroad. The trial court found that it was parallel to the Broadway Surface Railroad. Assuming, for the purpose of this decision, that this was a question of fact, and not of law, and that we are bound by the finding, we do not conceive

Parallel lines
of street rail-
roads—Traffic
contracts.

that fact to be conclusive on the question. The material ground upon which the contention is based is the proviso to section 15, ch. 252, Laws 1884, authorizing companies organized thereunder to lease or transfer their rights to run upon or over any portion of their railroad tracks to any other street surface railroad company authorized to run upon such route. The proviso is that the section should not be construed to authorize any of such companies "to lease its rights or franchises" to any other company owning and operating a road parallel thereto. By these contracts, the Broadway Surface Railroad acquired the right from the Broadway & Seventh Avenue Railroad, and from the Twenty-third Street R. Co., to run cars, and make a continuous trip, for a single fare, to the termination of their respective roads, over the tracks of such roads; and such roads, from their respective points of connection, were thereby respectively authorized to run cars over the Broadway Surface Railroad. That these rights were important and valuable, and inured largely to the convenience and benefit of the travelling public, is not now denied. The uniform course of legislation in reference to street railroads shows a policy on the part of the state to facilitate arrangements for the connection of continuous lines, and the transfer of passengers from one road to another, with the view of giving the longest service possible to the public without increase of fare. It can hardly be supposed that the legislature, while expressly making provisions for such facilities, intended to prescribe companies connecting with another road, which happened to own a line parallel for a certain portion of its length, but which also owned other lines extending beyond the parallel portion, from the benefits to be derived from a traffic contract. It seems to us that the obvious intent of this provision was to avoid the monopoly of parallel lines, and to prevent the acquisition by one railroad company of the exclusive possession and control of such lines. It therefore prohibits leases to parallel roads. This does not, and, in our judgment, was not intended to, preclude such companies from making traffic contracts for the partial use of their respective routes beyond the line of parallelism. These contracts were not, in terms or in effect, leases of such rights, and did not surrender possession or control of the road by its original owner. Such contracts were also authorized by chapter 218 of the Laws of 1839, and we do not consider that statute to have been repealed by the proviso of the act of 1884, or the other legislation on the subject. There are many other interesting and important questions presented by the briefs of the able counsel for the respective parties, which it might be proper to discuss were it not that the demands made by the claims of practical litigation upon our time are so imperative as to forbid the consideration of abstract and speculative investigations. Such questions must be left to occa-

sions when parties actually aggrieved present them, in a litigation where their consideration is essential to the determination of rights. The views expressed lead to a denial of the relief sought in the action by the plaintiff. The judgments of the special and general terms should be reversed, and the complaint dismissed, with costs to the defendants other than the receiver.

All concur.

ANDREWS and EARL, JJ., agree in the result upon these grounds: (1) The annulling act is constitutional and valid, and its effect was only to take the life of the corporation; (2) all the property of the corporation, including its street franchises and its mortgages and valid contracts,—including what are called the “traffic contracts with other railway companies,”—survived; (3) the act (chapter 371) is unconstitutional; (4) that act and the act chapter 310 are parts of the same scheme adopted by the legislature for the purpose of winding up the affairs of the corporation, and disposing of and distributing its property,—the main features of the latter act are unconstitutional and void,—and thus so much of the legislative scheme has failed that there is not enough left to save the whole act from condemnation; (5) as the latter act is thus wholly void, and this action is founded and depends solely upon it, there is no warrant for its maintenance, and therefore the judgment should be reversed and complaint dismissed.

Statute Repealing Charter Does Not Impair Obligation of a Contract Where Right of Repeal is Reserved.—*Greenwood v. Union Freight R. Co.*, 9 Am. & Eng. R. R. Cas. 526.

Effect of Repeal of Charter, on Rights of Stockholders, etc.—See *Greenwood v. Union Freight R. Co.*, 9 Am. & Eng. R. R. Cas. 526.

Effect of Reservation of Right to Alter or Repeal Charter.—See *County of Santa Clara v. Southern Pac. R. Co.*, 13 Am. & Eng. R. R. Cas. 182.

TEACHOUT

v.

DES MOINES BROAD-GAUGE STREET R. CO.

(Iowa Supreme Court, May 17, 1888.)

Stockholder—Corporate Powers—Fictitious Issue.—An agreed statement of facts submitted to the court by a corporation and one of its stockholders, which seeks the determination of the question whether the corporation has legal power to operate street railways by electricity or any motive force other than animal power, the object of which is to enjoin the corporation from expending its money and resources in applying such motive power to propelling cars upon tracks already constructed, and from constructing other lines of road to be operated by said power, presents a real issue between the parties and is not a fraud upon the court and upon other parties who would be affected by a decision thereunder.

Charter—Exclusive Privilege—Motive Power.—A charter which confers upon a street-railway company the power of constructing tracks in the street of a city, and operating railway cars thereon, but confines the operation of animal power only, and which declares that the privileges granted shall be exclusive for the term of 30 years, and that the city shall not during such period "grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted" does not deprive the city of authority to grant within such period a subsequent charter authorizing the construction of street railways to be operated by a motive power other than animal power.

APPEAL from District Court, Polk County.

This is a proceeding under section 3408 of the code, by which the parties thereto presented to the court below an agreed statements of facts, and sought the determination of the question whether the Des Moines Broad-guage R. Co. has legal power and authority to operate street railroads in the city of Des Moines by electricity or motive power other than animal power. The issue presented by the agreed statement of facts was in the nature of an action in equity, and the object was to enjoin the Broad-gauge R. Co. from expending its money and resources in applying the said motive power to propel its cars upon its railroad tracks now constructed, and from constructing other lines of road to be operated by said power. The Des Moines Street R. Co. appeared and sought to intervene in the proceeding. The right to intervene was denied, and upon a final hearing there was a decree enjoining the defendant from equipping and operating its lines of street railway, now in the streets of the city, with electric or other motive power other than animal power, and from expending the funds and moneys

of said company in the construction of other lines of street railway in said city to be so operated. The defendant appeals from this decree, and the Des Moines Street R. Co. appeals from the order denying it the right to intervene in the proceeding.

Read & Read for H. E. Teachout, appellant.

Parsons & Perry and *Kauffman & Gurnsey* for the Des Moines Street R. Co., appellant.

Baylies & Baylies for appellee.

ROTHROCK, J.—1. This proceeding grows out of the litigation which originated between the Des Moines Street R. Co. and the Des Moines Broad-gauge R. Co., two rival street railways in the city of Des Moines. It is in fact another feature of the contention between said companies which was so elaborately considered by this court in the case of *Railroad Co. v. Railway Co.*, and other cases, 33 N. W. Rep. 610; s. c., 32 Am. & Eng. R. R. Cas. 209, and 35 N. W. Rep. 602. After the filing of the opinion on rehearing in the cases named, the city council, by certain resolutions duly passed, determined that the accommodation of the city, and the welfare of its inhabitants, required that improved motive power, other than animal power, and by which cars can be moved at an average speed of not less than eight miles an hour, should be used upon all broad-gauge street-car lines then in operation in the city, and upon all present and future extensions of said lines; and by an ordinance passed by the council, authority was given to the Broad-gauge Co. to change its motive power from animal power to electricity, or to such other motive power as may be found practicable to move its cars at the required rate of speed. These acts of the city council were done in pursuance of an application made by said railway company to the council. The plaintiff Teachout is a stockholder in the Broad-gauge Co., and is surety for it upon some of its indebtedness. He was active in procuring permission from the city council to the company to change its motive power. After the permission and authority were secured, he instituted this proceeding, in which he claimed that the corporation in which he was a stockholder could not acquire any valid authority from the city council to operate a street railroad in said city by any propelling power. He was overruled by act of the corporation before this proceeding was commenced. The agreed statement of facts sets forth this matter of difference, and the question presented to the court for its determination was whether the city council had any power or authority to confer the right upon the company, in view of the decision of this court in the cases above cited. The Des Moines Street R. Co., being what is known as the "Narrow-gauge R. Co.," appeared and filed what was denominated a

"petition of intervention," in which it was claimed that the proceeding was fictitious, and a fraud upon the rights of the Narrow-guage Co., and that it was not a real controversy between the parties, and demanded that it be dismissed. A motion was made by the parties to the proceeding, to strike the petition of intervention from the files, for the reason, among others, that the cause had been submitted to the court for its decision, and that there was no right to intervene in the action and make demands which would delay its determination. The motion was sustained and the application to intervene was overruled; but, inasmuch as it had been suggested to the court that the controversy was not real and in good faith between the parties, it was ordered that the plaintiff and the officers of the Broad-guage Co. appear at a time named and submit to an examination touching the question of good faith and the real nature of the controversy, and that the Des Moines Street Railway should be permitted to appear and examine the said parties touching the controversy, and to introduce other proof on said question material thereto. Thereupon an investigation was had, evidence was introduced, and the cause was submitted to the court, and at the same time, or about that time, another petition of intervention was filed by the Des Moines Street R. Co., in which a demand was made that it be allowed to intervene in the merits of the case. On the final submission, the following orders were made:

"This cause having been heretofore submitted to the court by and between the parties, upon the written submission and statement of facts filed with the clerk on the 4th day of February, 1888, and the court, being fully advised in the premises, finds that the equities are with the plaintiff H. E. Teachout. It is therefore ordered and decreed by the court that the defendant, the Des Moines Broad-guage Street R. Co., be restrained and enjoined from equipping and operating its lines of street railway, now laid in the city, with electric or other motor power other than animal power, and from expending the funds and moneys of said company in so equipping said line of road, or in construction, for operation in said city, other lines of street railway, and that the costs of this proceeding be taxed against the defendant. The Des Moines Broad-guage Street R. Co. excepts. And the Des Moines Street R. Co. is refused leave to file its petition of intervention, to which the said Des Moines Street R. Co. excepts, and has five days in which to file its bill of exceptions. • MARCUS KAVANAUGH, JR., Judge."

"Now upon this 11th day of February, 1888, this cause coming on to be further heard upon the petition and motion of the Des Moines Street R. Co. that the court decline to receive and determine this cause upon the submission and agreed statement

of facts by the said Teachout and the said Des Moines Broad-gauge Street R. Co., for the reason that there is no real controversy between said parties, but the same is a fraud upon both the court and the said Des Moines Street R. Co., pursuant to the order of this court made thereupon on the 6th day of February, 1888; and the said Des Moines Street R. Co. appearing by its counsel, Galusha Parsons, and the said H. E. Teachout by his counsel, W. L. Read, and the said Des Moines Broad-gauge Street R. Co. by its counsel, R. N. Baylies, and the same having been taken under advisement,—now, upon this 13th day of February, 1888, it is ordered that the said petition and motion be, and the same are hereby, in all things denied; to which ruling and decision the said petitioner, by its counsel in open court, duly excepted. And the said Des Moines Street R. Co. having presented its petition for leave to intervene to the merits of the said submission, the said petition and motion are denied; to which ruling and decision the said petitioner, by its counsel in open court, duly excepted. It is further ordered and adjudged that the said H. E. Teachout recover of and from the said Des Moines Street R. Co. his costs of said proceeding, taxed at —, to which the said Des Moines Street R. Co. duly excepted; and it is further ordered that, in the taxation of such costs, the clerk of this court will not tax, as a part thereof, any fees for the said Teachout, or the other officers of the said Des Moines Broad-gauge R. Co.

MARCUS KAVANAUGH, Judge."

It will thus be seen that the court was of the opinion that the suggestion that the agreed statement of facts did not present a real issue between the parties, but was a fraud upon the court and upon other parties, was not well founded, and rendered a decree accordingly. We do not deem it necessary to review the evidence upon this question in detail. Issue between
the parties.

We are satisfied that the district court was correct in determining that the proceeding ought not to be dismissed as fictitious. It is not claimed that a stockholder in a corporation may not maintain an action to restrain the corporation from acts in excess of its corporate power or authority. It is well settled that such an action will lie. *Sims v. Railroad Co.*, 37 Ohio St. 556; *Cook, Stocks*, §§ 672-674, and authorities there cited. The matter of difference which was submitted to the court was one not of mere expediency as to the prosecution of the business of the corporation. Counsel for the Des Moines Street R. Co. strenuously contend that the company they represent have the exclusive right to construct, maintain, and operate street railroads in the city; and, if their contention is correct, it would be a most flagrant violation of the corporate powers of the Broad-gauge Co. to waste its substance, and involve its stockholders in a large expenditure of money, without legal

authority to move a car upon the streets; and this was the very question which was presented to the court for its determination. And while it may be true that Teachout was active in his endeavors to save the property of the company, and prevent the great loss consequent upon the adjudged exclusive right of the Narrow-gauge Co., it does not follow that he agreed with the officers and counsel of said company that the decision of this court precluded the company in which he was a stockholder from operating their lines by a motive power other than animal power. The record shows that so far as his action as a director of the corporation was concerned, he opposed taking any corporate action to apply electric power to the lines of street railroad then owned by the company.

2. Counsel for the Des Moines Street R. Co. complain that it was not allowed to intervene in the proceeding. It is very clear that it had no right to intervene to defeat the action or proceeding. Section 2684 of the Code provides: "The court shall determine upon the intervention at the same time that the action is decided, and the intervenor has no right to delay." And in *Van Gorden v. Ormsby*, 55 Iowa, 657, it is said that "an intervenor cannot be allowed to tender an issue which can be tried only by a change in the form of proceeding, and a continuance of the cause for testimony. If the person intervening has rights which require protection, and which cannot be determined in the main action without delaying the trial, he ought not to intervene, but should commence an original action, and, if need be, and a proper case therefor can be made, protect his interests by injunction." Now, if the intervenor had presented a petition when its first appearance was made, and without setting up facts which must have unavoidably caused delay, and joined the plaintiff, Teachout, in the demand that the Broad-gauge Co. be enjoined from applying electricity as a motive power upon its road, and upon the ground that the intervenor had the exclusive right to build, maintain, and operate street railroads in the city, it may be that the petition for intervention should have been entertained by the court. But the record does not show that the court held that there was no right of intervention in any event. The refusal to permit the intervention upon the merits may well have been put upon the grounds that it was presented too late, and that it attempted to raise issues which would necessarily involve delay. As will be seen further in this opinion, the only question to be determined arose upon the ordinances and resolutions of the city council. It is true, the agreed statement of facts recited that the Des Moines Street R. Co. had failed to furnish efficient street-car service to the public, and this was denied in the petition of intervention. But, in our opinion, this raised an im-

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vention after
submission of
case.

material issue, as will presently be seen; and the Des Moines Street R. Co. is in no position to raise that question because the court below, in effect, determined, with a recital of record before it, that the street-car service was inefficient, and with nothing to contradict or call in question the recital that the Narrow-gauge Co. had the exclusive right to maintain and operate street railroads in the streets of the city.

3. We come now to the question of the power or authority of the Broad-gauge Co. to operate its lines by electricity, or other improved or newly-discovered motive power. This question has been elaborately argued by the counsel above named, and by other counsel in behalf of the city and of North Des Moines and of the public generally. It is well to understand the precise point to be determined. As we view it, the power is undoubted, unless the Des Moines Street R. Co. has such an exclusive right to construct, maintain, and operate street railroads in the city as to exclude all competition of other lines, whatever motive power may be employed by the other lines. In the cases already determined by this court, involving the rights of these rival companies, we determined that the exclusive right to furnish to the city of Des Moines its street-railway service, for 30 years from the time the right accrued, was in the Narrow-gauge Co. The statement would seem to include all street railways, as well those operated by animal power as those operated by electricity, or by cables operated by steam or other power; and much of the argument in behalf of the Des Moines Street R. Co. is founded upon the claim that this court, in the reasoning in the main opinion, regarded the right to exclusive street-car service without reference to the motive power used. The question then before the court was between two rival companies, both of which operated their lines by animal power. The question of the kind of street-car service was in no manner involved in the case. Those cases were contested, both upon the original submission and upon the rehearing, by able and distinguished counsel. We think it is safe to say that, upon the original argument of the case, the question as to the motive power was not in the mind of court or counsel. At least, it is undoubtedly true that no such question was presented to this court. In view of the general discussion of the subject in the original opinion, the following language was used in the opinion upon rehearing: "It is proper, however, that we should say, in order to prevent any misconstruction of our opinion, that it was not our intention to hold, and it is not held, that the city is precluded, by the ordinance under which the plaintiff is acting, from availing itself of any improved street railway to be operated by other than animal power, if reasonably necessary to meet the

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public wants. We did not regard that question as in the case, and on that we express no opinion ;" and the decrees in those cases do not require the Broad-gauge R. Co. to remove their railroad tracks from the streets. They are enjoined from operating their lines of road by cars moved by animal power after the 1st of May, 1888. This supplemental opinion and these decrees are a sufficient answer to the argument of counsel based upon the reasoning of the opinion in the cases cited. It was purposely left as an open question ; and, as the *personnel* of the court is now nearly the same as then, it is not improper to say that such was the intention of the court. It is proper to state that the ordinance authorizing the Broad-gauge Co. to use electricity, or other motive power other than animal power, appears to us to be well guarded, so as to protect the rights of the Narrow-gauge Co. in the use of its lines already in operation, or other lines which it may desire to construct in the exercise of its exclusive right to the use of "horse-cars." And it seems to us that we must determine the rights of the parties by the record they have made, or, rather, by the grant of power given to them by the city council. This grant of power is found in the ordinance of the city which was enacted in June, 1866 ; and that part of it necessary to be considered in determining this case is as follows : "Section 1. Be it ordained by the city council of the city of Des Moines, that consent, permission, and authority is hereby given and granted to and duly vested in the Des Moines Street R. Co., and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs, side-tracks, and switches-in, upon, and along all the streets, and such alleys only fronting on which said company have depots, stables, or car-houses, and over the bridges and such streets in the city of Des Moines, with their present and future extensions and connections ; and authority is hereby given said company, their successors and assigns, to keep, maintain, use, and operate thereon railway cars in the manner and for the time and upon the conditions hereinafter mentioned and prescribed. Sec. 2. The cars to be used upon such tracks shall be operated with animal power only, and shall not connect with any other railway on which other power is used, and no railway car or carriage used upon any other railway in this state shall be used upon any of said tracks. . . . Sec. 10. The right herein granted to said company to operate said railway shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon ; and the said city of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will im-

pair or destroy the rights and privileges herein granted to said company."

It seems to us, keeping in mind the fundamental rule that corporations are invested with such powers only as are expressly conferred upon them, and such other powers as are necessary to carry out those expressly granted, there is little room for discussion or debate as to the powers conferred upon the Narrow-gauge Co. by this ordinance. It has the exclusive right to operate its railways by animal power; and it has no more right to interpose objections to the building and operation of other street railroads, to be operated by other power, than if no grant of power has ever been made to it. The city, it is true, agreed, by section 10 of the ordinance, that it would not "confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company." It is strenuously contended that the granting of the right to operate other street cars will necessarily impair the rights of the Narrow-gauge Co., by diminishing its revenue, which is derived from the carriage of passengers. Perhaps this argument is sufficiently answered by the thought that, when the city made the contract, based upon this ordinance, the parties thereto were dealing with the known, and not with the unknown. It may well be questioned whether the city had any power to contract that no other means of public travel should be allowed upon the streets of the city except by cars drawn by horses for the period of 30 years. If so, the establishment of hack lines or omnibus lines, or other means of public conveyance, would impair the revenue of the Narrow-gauge Co., and thus impair its rights under this ordinance. Its right is to operate a horse railroad. It is entitled to the exclusive right to do so, and to use all improvements that may be made thereto; but to nothing more. The city cannot impair that right; but it does not follow that it may not authorize other means of street travel. It did not undertake to confer upon the company the right to carry all the passengers who might desire to travel by public conveyance upon the streets; and it did not, by the ordinance, contract that new and improved and undiscovered methods of travel might not be adopted as the public wants might demand. This ordinance and contract were made by the city in behalf of the public, and it should not be so construed as to fetter and prevent the right to use new methods and appliances, the result of the inventive genius of the age, or to apply the discovery and application of the latent powers of nature to the uses of man. As well might the chartered owner of a rope-ferry have insisted, years ago, that his exclusive right to that method of transportation prevented the right to charter a ferry propelled by steam when that element of nature was discovered as a propelling

power. As sustaining these views, see *Gas-light Co. v. City of Saginaw*, 28 Fed. Rep. 529; *Railway Co. v. Tramway Co.*, 30 Fed. Rep. 324; *Bridge v. Hoboken Co.*, 1 Wall. 116.

We think the decree of the district court should be reversed, and a decree will be entered in this court in accord with this opinion, or the cause will be remanded to the court below for that purpose.

Grants of Exclusive Privileges to Street R. Cos.—See, generally, *Des Moines St. R. Co. v. Des Moines Broad-gauge R. Co.*, 32 Am. & Eng. R. R. Cas. 209, note, 216.

Municipal Corporation—Granting Exclusive Privilege.—A municipal corporation has no authority to grant an exclusive privilege or create a monopoly unless expressly empowered by the legislature, see *Appeal of Meadville Fuel Gas Co. (Pa.)*, 4 Atl. Rep. 733, because a municipal corporation has no authority to create a monopoly, or to grant an exclusive privilege, unless expressly empowered by the legislature. *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19; *State v. Cincinnati Gas Light & Coke Co.*, 18 Ohio St. 262; *Dill Mun. Corp.*, sec. 695; *Jackson County R. Co. v. Interstate Rapid Transit R. Co.*, 24 Fed. Rep. 306; *Indianapolis v. Indianapolis Gas L. & C. Co.*, 66 Ind. 396; *Citizens' Gas Light Co. v. Louisville Gas Co.*, 81 Ky. 263; s. c., 1 Am. & Eng. Corp. Cas. 156; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; bk. 29, L. ed. 516; s. c., 10 Am. & Eng. Corp. Cas. 639; *New Orleans Water-works Co. v. Rivers*, 115 U. S. 674; bk. 29, L. ed. 525; s. c., 10 Am. & Eng. Corp. Cas. 662; *City of Quincy v. Bull*, 106 Ill. 337; s. c., 4 Am. & Eng. Corp. Cas. 554; *Gale v. Kalamazoo*, 23 Mich. 344; s. c., 9 Am. Rep. 80; *State v. Milwaukee Gas Light Co.*, 29 Wis. 454; s. c., 9 Am. Rep. 598; *State v. Graves*, 19 Md. 351; *Montjoy v. Pillow*, 64 Miss. 705; *Seal v. Donnelly*, 60 Miss. 658; *Sullivan v. Supervisors of Lafayette Co.*, 58 Miss. 790; *Davenport v. Kleinschmidt*, 6 Mont. Tr. 502; *Milhau v. Sharp*, 27 N. Y. 611; s. c., 28 Barb. (N. Y.) 228; 17 Barb. (N. Y.) 435; *People v. Kerr*, 27 N. Y. 188; *Davis v. Mayor, etc., of New York*, 14 N. Y. 506; *State v. Mayor, etc., of New York*, 3 Duer (N. Y.), 119; *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339; *Mayor v. Ohio & P. R. Co.*, 26 Pa. St. 355; *City of Brenham v. Brenham Water Co.*, 67 Tex. 542; s. c., 20 Am. & Eng. Corp. Cas. 207; *Citizens' Street R. Co. v. Jones*, 34 Fed. Rep. 579; *Stein v. Bienville Water Supply Co.*, 34 Fed. Rep. 145; *Saginaw Gas Light Co. v. City of Saginaw*, 28 Fed. Rep. 529; *New Orleans City R. Co. v. Crescent R. Co.*, 12 Fed. Rep. 308; *Pullman Palace Car Co. v. Texas & Pac. R. Co.*, 11 Fed. Rep. 625. Compare *Chicago R. Co. v. People*, 73 Ill. 541.

But it has been held that a municipality may delegate any of its police powers to persons and corporations and thereby create a monopoly. *City of Louisville v. Weible (Ky.)*, 1 S. W. Rep. 605.

Same—Grant by Legislature.—It cannot be questioned that the state in its sovereign capacity may grant an exclusive privilege or a monopoly which will be protected against subsequent conflicting grants. *Louisville Gas Co. v. Citizens' Gas Light Co.*, 115 U. S. 683; bk. 29, L. ed. 510; s. c., 10 Am. & Eng. Corp. Cas. 671; *New Orleans Water-works Co. v. Rivers*, 115 U. S. 674; bk. 29, L. ed. 525; s. c., 10 Am. & Eng. Corp. Cas. 662; *New Orleans Gas Light Co. v. Louisiana Light Co.*, 115 U. S. 650; bk. 29, L. ed. 516; s. c., 10 Am. & Eng. Corp. Cas. 639; *Saginaw Gas-light Co. v. Saginaw Gas Co.*, 28 Fed. Rep. 520, 534. But such grants are to be strictly construed, and no exclusive privileges pass unless by express words or necessary implication. *Citizens' St. R. Co. v. Jones*, 34 Fed. Rep. 579.

Same.—The Grant of an Exclusive Privilege is said to be a Contract, the obligation of which cannot be impaired by subsequent legislation, except so far as the protection of public health, morals, or safety may require. *Citizens' Water Co. of Bridgeport v. Bridgeport Hydraulic Co.*, 55 Conn. 1; *City of Louisville v. Weible* (Ky.), 1 S. W. Rep. 605; *People v. Squire*, 107 N. Y. 593; *St. Tammany Water-works Co. v. New Orleans Water-works Co.*, 120 U. S. 64; bk. 30, L. ed. 563; *New Orleans Water-works Co. v. Rivers*, 115 U. S. 674; bk. 29, L. ed. 525; s. c., 10 Am. & Eng. Corp. Cas. 662; *New Orleans Gas Light Co. v. Louisiana Light Co.*, 115 U. S. 650; bk. 29, L. ed. 516; s. c., 10 Am. & Eng. Corp. Cas. 639; *Saginaw Gas Light Co. v. City of Saginaw*, 28 Fed. Rep. 529.

In the recent case of *Fort Worth St. R. Co. v. Queen City R. Co.* (Tex.), 9 S. W. Rep. 94, the supreme court of Texas held, that, where a tract of land is the property of the railroad company, without any limitation of ownership, and a horse-railway company, for a valuable consideration, obtains the right to build its road over the land to the depot of the railroad, to the exclusion of other horse railroads, and the contract is recorded, the horse-railway company is entitled to an injunction against another company interfering with this right; that where a railroad company owning a tract of land builds a depot thereon, and gives a horse-railway company an exclusive right to build its road to the depot over the land, by a recorded instrument, any dedication of the roadway to the depot to the public would be subject to the easement of the horse railway; and the necessity for such roadway would be subject to the bill of rights of Texas (section 17), providing that no person's property shall be taken for the public use without compensation unless by his consent; also that such a contract is not a monopoly, but an easement granted by the owner of the fee, and can be taken for public use by due process of law. The court cite *Campbell v. O'Brien*, 75 Ind. 222; s. c., 10 Am. & Eng. R. R. Cas. 266; *Cincinnati v. White*, 31 U. S. (6 Pet.) 431; bk. 8, L. ed. 452; 2 Dill. Mun. Corp. secs. 631, 635; *Ramthun v. Halfman*, 58 Tex. 553; *Gilder v. Brenham*, 67 Tex. 345; *Commonwealth v. Pittsburgh R. Co.*, 24 Pa. St. 159; s. c., 62 Am. Dec. 372; *East & West R. Co. of Alabama v. East Tenn. V. & G. R. Co.*, 75 Ala. 275; s. c., 22 Am. & Eng. R. R. Cas. 81; *Mayor v. Starin*, 106 N. Y. 1; *Coffey v. State*, 13 Tex. App. 580; *Hughes v. Tinsley*, 80 Va. 263; *Pierce R. R.* 260, 496, 497.

It has been laid down as a general rule, that contracts, the object of which is to secure to the obligee a monopoly or an exclusive use for public purposes of land held by other corporations, or by a private owner, if subject to the right of eminent domain, are void. See *American Rapid Telegraph Co. v. Conn. Telephone Co.*, 49 Conn. 352; s. c., 44 Am. Rep. 237; *Western Union Telegraph Co. v. American Telegraph Co.*, 65 Ga. 160; s. c., 38 Am. Rep. 781; *Skrainka v. Scharringhausen*, 8 Mo. App. 522; *Western Union Telegraph Co. v. Atlantic & Pacific Telegraph Co.*, 5 Nev. 102; *Western Union Telegraph Co. v. Atlantic & Pacific Telegraph Co.* (Ohio), 1 W. L. Bull. 222; s. c., 3 Cent. L. J. 569; *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600; *Pensacola Telegraph Co. v. Western Union Tel. Co.*, 96 U. S. (6 Ott6) 1; bk. 24, L. ed. 708; *Western Union Tel. Co. v. American Tel. Co.*, 19 Am. L. Reg. (N. Y.) 173; *Western Union Telegraph Co. v. Balt. & Ohio Tel. Co.*, 23 Fed. Rep. 12; *Western Union Telegraph Co. v. Balt. & Ohio Tel. Co. of Texas*, 22 Fed. Rep. 133; *Western Union Tel. Co. v. Balt. & Ohio Tel. Co.*, 19 Fed. Rep. 660; *Western Union Tel. Co. v. American U. Tel. Co.*, 9 Biss. C. C. 72; *Western Union Tel. Co. v. St. Joseph & W. R. Co.*, 1 McCr. C. C. 565; *Western Union Tel. Co. v. Burlington & S. W. R. Co.*, 3 McCr. C. C. 130; s. c., 11 Fed. Rep. 1; *Baxendale v. Great Western R. Co.*, 5 C. B. (N. S.) 336.

STATE *ex rel.* CREAM CITY R. CO.

v.

HILBERT, City Treasurer.

(Wisconsin Supreme Court, September 18, 1888.)

Municipal Corporations—Grant of Franchise—Authority of Legislature.—The fact that the legislature may confer upon a city or county the power to grant to an existing corporate body a franchise, or to create a corporation with certain franchises and powers, does not take away the constitutional power of the legislature, conferred by section 1, art. 2 of the Wisconsin constitution, to take away the power so granted to the city or county, or to alter or repeal the acts of the city or county taken under such delegated authority.

Railways in Streets—License Fee—Increase.—Under section 1862, substituted for section 4978 of the Wis. Rev. Stat. repealing the Laws of 1860, c. 313, sec. 3, providing that street railway companies should be subject to the payment of such license fees as the common council of the municipal corporation granting the franchise might prescribe, the repealing statute providing that any municipal corporation may grant the use of its streets to any such corporation under whatever law formed, and such corporation shall be subject to the payment of such license fees as the proper municipal authorities may from time to time prescribe; a municipal corporation has the right to increase, within reasonable limits, a license fee originally imposed by its charter, although its franchise was granted before the enactment of the repealing statute.

APPEAL from the Milwaukee County Superior Court.

E. Mariner (E. P. Smith, of counsel) for appellant.

Eugene S. Elliott, City Attorney, for respondent.

TAYLOR, J.—The appellant sued out an alternative writ of *mandamus* from the superior court of Milwaukee county, directed to the respondent, commanding him to accept the sum of \$870, and execute a receipt for a license for 87 cars of the relator, to be run by said railroad company for the current year upon its railroad in said city. On the return of said writ the respondent moved to quash it, on the ground that the facts stated in the petition and writ do not justify the court in issuing the same. The motion to quash the writ was granted, and from the order granting such motion the relator appeals to this court. The petition for the writ sets up the following facts: (1) That the petitioner is a corporation incorporated under the general laws of this state, and is engaged in the operation of a street-railway in the city of Milwaukee, and has been since December, 1874; that in 1874, being then

such corporation, and being desirous to construct and operate a street-railway in the public streets of the city of Milwaukee, it applied to the said city for a franchise to construct, operate, and maintain a street-railway in said city; and thereupon the city of Milwaukee, in pursuance of chapter 313, Laws 1860, passed an ordinance, December 28, 1874, which was duly approved by the mayor in January, 1875, wherein and whereby said city granted to the corporation (naming them), their successors and assigns, the exclusive right, permission, and authority to lay a single or double-track railway in certain streets in said city in said ordinance specified. Section 7 of said ordinance is in the words following: "The rate of fare for any distance shall not exceed 5 cents, except when cars or carriages shall be chartered for special purposes; but before any car or carriage shall be used or operated on said railway, said grantees, their successors or assigns, shall pay to the said city a license fee of \$10 per annum for each car or carriage; said license fee to be paid and a license for such car or carriage to be obtained in the same manner as regulated by ordinance respecting hacks in said city, and any officer, conductor, driver, or agent of said grantees, their successors or assigns, who shall operate or cause to be driven or operated upon said line or railway any car or carriage, unless the same shall have first been duly licensed, as herein provided, shall be punished by fine, not less than \$10 nor more than \$50." (2) The petition alleges that the corporation accepted the said ordinance, and constructed its road in accordance with the provisions thereof, and has operated the same and paid the license fee prescribed by said ordinance down to and including the year 1887. It also alleges that the property of said corporation is regularly assessed and taxed by said city, and that the company have regularly paid all taxes assessed thereon. (3) That in the year 1888 the city of Milwaukee passed a new ordinance, by the terms of which it was provided, among other things, that no company should operate, run, or cause to be operated or run, upon any street-railway in the city of Milwaukee, any car without paying a license for each such car or vehicle; that such license should be granted by the mayor, signed by the city clerk, and sealed with the corporate seal of the city; and that no license should be issued until the party applying for the same should present to the city clerk the treasurer's receipt for the payment of the annual license fee; that the license fee for licenses for each car or other vehicle so operated by any such company should be \$15. (4) It is alleged substantially that the petitioner desired to operate on its lines of railroad in said city, in the year 1888, 87 cars (giving their numbers); that the mayor executed to the petitioner a proper permit for a license for such cars; that it presented such permit to the respondent, the treasurer of the city, and tendered to said

treasurer the sum of \$10 per car, in all \$870, in accordance with section 7 of the ordinance of December 28, 1874, and requested the city treasurer to deliver him his receipt for the payment to the city of the annual license fee for each of said cars, and that the treasurer refused to deliver such receipt on the sole ground that the city, by its ordinance, approved February 16, 1888 (section 400), provided that a license fee for licenses for each car operated by any street-railway in said city should be \$15 per car, and the city treasurer still refuses to give the receipt demanded. There is a further allegation that the relator is now and always has been ready and willing to pay the license fee prescribed by said section 7 of the ordinance of December 28, 1874. The prayer of the petition is that the treasurer be commanded to receive the said \$870, tendered by the company, and to execute and deliver to the relator a receipt in due form, to be delivered to said city clerk by the petitioner, so that it may receive licenses for its cars as aforesaid.

The only question in this case is whether the railway company is entitled to a license to run its cars in said city on its railway tracks on paying the license fee of \$10 per car as prescribed by section 7 of the ordinance of December 28, 1874, or whether it must pay the license fee prescribed by the ordinance of February 16, 1888. And this question depends upon the other question, whether the ordinance of December 28, 1874, fixing an annual license fee of \$10, amounts to an irrevocable contract with the corporation that no other or greater license fee shall be demanded of said railway corporation during the life of such corporation, or rather during the time fixed by section one of said ordinance of December 28, 1874, giving the use of the streets to said corporation; which time is limited to 50 years from July 1, 1874. The allegations of the petitioner

in the petition as to its corporate existence is very general, and in no part of the petition are its powers stated except such as were granted to it by the city of Milwaukee, as is alleged, under the power and authority granted to said city by chapter 313, Laws 1860. The allegations as to its being a corporation, and as to its powers as a corporation, are all set up in the first paragraph of the foregoing statement of facts. It will be seen by this statement of facts made in the petition that this corporation had no power to construct the particular railway it did construct in said city of Milwaukee, except under the power granted to it by the ordinance of December 28, 1874, and that the city obtained the power to make such grant to the corporation by virtue of chapter 313, Laws 1860. According to the allegations of the petition, the power of the relator to build and operate a street railway in the streets of the city of Milwaukee, and to run

**Question
stated.**

**Incorporation
and powers of
petitioner.**

its cars thereon for the carriage of passengers, was a power indirectly derived from the state through the action of the city of Milwaukee, acting under the authority of chapter 313, Laws 1860. Upon this appeal the relator is bound by the facts stated in its petition, and the petition expressly alleges "that in 1874 it applied to said city for a franchise to construct, operate, and maintain a street railway in said city, and thereupon the city of Milwaukee, in pursuance of the statute (chapter 313, Laws 1860), passed an ordinance," etc.; referring to said ordinance, and especially to the seventh section of such ordinance fixing a license fee for running its cars upon said road. It hardly admits of question that the powers granted by the city under the ordinance of December 28, 1874, to build and maintain, in the streets of said city, railroad tracks, and operate and run cars thereon for the carriage of passengers, was a franchise granted to the corporation known as the Cream City R. Co. Fact that franchise was granted by city immaterial. The fact that the franchise is granted by the state through the action of the city of Milwaukee cannot change the nature of the thing granted. The fact that the legislature may confer upon a city or county the power to grant to an existing corporate body a franchise, or to create a corporation with certain franchises and powers, does not take away the constitutional power of the legislature to take away the powers so granted to the city or county, or to alter or repeal the acts of the city or county, done under such delegated authority. If such power of repeal and revocation did not remain in the legislature, then the protection which was intended to be secured to the state by section 1, art. 11, of the constitution, which provides that all general or special acts enacted under the provisions of that section may be altered and repealed by the legislature, could be avoided and rendered nugatory. The laws referred to in the paragraph quoted are general or special acts creating corporations. We do not understand that the learned counsel for the appellant seriously questions the power of the legislature, under the section of the constitution above quoted, to alter, amend, or repeal the ordinance of the city in respect to this railroad, but it is claimed that until the legislature has interfered directly, the city itself cannot change the ordinance of December 28, 1874, Power of city to change ordinance of Dec. 28, 1874. except so far as chapter 313, Laws 1860, authorizes the city to change such ordinance; and it is further insisted that chapter 313 does not give the city any power to change that part of its ordinance which fixes the annual license fee for running the cars of the company. This contention is based upon the language of section 3 of said chapter 313, Laws 1860, which reads as follows: "Any street railroad which may be constructed pursuant to any authority which may be granted, according to

the provisions of this act, shall be constructed upon the most approved plan for the construction of city railroads, and shall be run as often as the convenience of passengers shall require, and shall be subject to such reasonable rules and resolutions in respect thereto as the common council of the city, in which such railroad shall be constructed, may from time to time by ordinance prescribe, and to the payment of such license fee to the city in which such road may be constructed, for each and every car run thereon, as may be prescribed by the common council of such city." It will be seen that the common council of the city are authorized to make such rules and regulations in respect thereto as it may from time to time by ordinance prescribe; and the common council may also subject the corporation "to the payment of such license fee to the city, for each and every car run thereon, as may be prescribed by the common council of said city." It is urged that because this latter clause of the section does not read, "as may be prescribed from time to time by the common council," that the power of the council to prescribe a license fee, when once exercised, is exhausted, and they have no power to prescribe a different fee,—in any event not until the legislature shall by some further enactment authorize such change by said council.

Admitting that the council could not, under chapter 313, Laws 1860, prescribe a greater license fee than is prescribed by

**Legislature
authorized
change in
license fee.**

the ordinance of 1874, unless authorized to do so by the legislature, still we are of the opinion that the legislature has by section 1862, Rev. Stat., authorized such change. Chapter 313, Laws 1860, was repealed by section 4978, Rev. Stat., and section 1862 of said revision was substituted in lieu of said chapter 313, Laws 1860, section 1862, among other things, provides that any municipal corporation may grant to any such corporation under whatever law formed, such use, etc., and that "every such road shall be constructed upon the most approved plan for such roads, and shall be subject to such reasonable rules and regulations and the payment of such license fees as the proper municipal authorities may from time to time prescribe." It seems to us very clear that all the provisions of this act apply to every street railroad corporation whether organized before or after the enactment of the Revised Statutes of 1878, and consequently applies to the Cream City R. Co., and that since the enactment of said section 1862, Rev. Stat., if not before, the proper municipal authorities of the city of Milwaukee may from time to time change the license fee demanded from said company, so long at least as the fee demanded is not clearly shown to be an unreasonable one. Whether, under the authority given, the city authorities would have the power to demand a

license fee of so large an amount as to make it impossible for the company to pay and still operate their road profitably, is a question not involved in this case. The increase in the fee demanded in this case does not appear to be unreasonable in amount, and cannot, in itself, be any material hinderance to the operation of said road. If it be conceded, as it seems to us it must be under the decisions of this court and of the supreme court of the United States, as well as other state courts, that under section 1 of article 11 of our state constitution one legislature cannot create a corporation and give it powers or immunities which a subsequent legislature cannot alter or wholly take away, and that one legislature cannot deprive a subsequent legislature of the powers reserved to it by said section 1, art. 11, of the constitution, by delegating to a city or county the power to grant corporate rights to a corporation, then the legislature, in passing section 1862, Rev. Stat., exercised a lawful authority in giving to the cities in which street railroads were operated authority to change the license fees for running their cars on the roads in such cities, and consequently the change made by the city of Milwaukee was a lawful change. It cannot be contended, and we think it is not seriously contended by the learned counsel for the appellant, that if the powers granted to the railroad company by the city in 1874 had been granted in the same terms directly by the legislature, such grant would have created, as he now claims, an irrevocable contract. The provision of our constitution has taken away from the legislature the power of making such an irrevocable contract with a corporation. It seems to us this is the decision of this court in the cases of *Railroad Co. v. Trempealeau Co.*, 35 Wis. 257-265; *Attorney General v. Railroad Co.*, Id. 425-574 *et seq.*; and these decisions are sustained by the decisions of the supreme court of the United States. *Railway Co. v. Philadelphia*, 101 U. S. 528-536, 83 Pa. St. 429-434. In the case of *New Jersey v. Yard*, 95 U. S. 104-111, Justice Miller, in speaking of the difference in the power of the legislature when there is no constitutional inhibition and when there is such constitutional inhibition, says: "The case differs from those in which, by the constitution of some of the states, this right to alter, amend, and repeal all laws creating corporate privileges becomes an inalienable legislative power. The power thus conferred cannot be limited or bargained away by any act of the legislature because the power itself is beyond the legislative control."

But if the city of Milwaukee, in granting corporate powers to the appellant, could bind itself and the state by a contract from which it could not relieve itself, although authorized to do so by a subsequent act of the legislature, still we are of the opinion that under the well-established rules of law which must gov-

ern in the construction of an act of the legislature, or the act of the municipal authorities of the city, the ordinance in question did not make an irrevocable contract.

The language which it is insisted creates the irrevocable contract between the railroad company and the city is as follows: "The rate of fare for any distance shall not exceed 5 cents, except when cars or carriages shall be chartered for specific purposes; but, before any car or carriage shall be used or operated on said railway, said grantees, their successors or assigns, shall pay to the said city a license fee of \$10 per annum for each car or carriage; said license fee to be paid and a license for such car or carriage to be obtained in the same manner as regulated by ordinance respecting hacks in said city." It will be seen by an examination of this language that there are no negative words in the language used, and there is scarcely an implication in this language that the city will not or shall not change this license fee for the term of 50 years, without the consent of the company. All the authorities hold that in order to bind the state or law-making power in cases of this kind, by contract, the language used must be clearly unequivocal. In construing acts of this kind the supreme court of the United States has said: "The surrender, when claimed, must be done by clear, unambiguous language, which will admit of no reasonable construction conflicting with the reservation of that power. If a doubt arises as to the intent of the legislature, that doubt must be solved in favor of the state. Delaware Railroad Tax, 18 Wall. 206-226. In *Com. v. Bank*, 10 Pa. St. 451, in which it was claimed that, because the charter as originally granted prescribed the payment of taxes on its dividends, no higher tax could afterwards be demanded by the state, the court say: "That the original act was nothing more than a simple declaration of the tax then to be paid by the bank, and did not give the slightest intimation of an agreement or understanding that the tax should not be increased during the existence of the charter." This language of the Pennsylvania court is cited approvingly by the supreme court of the United States in the Delaware Tax Case, above cited. The language above cited from the ordinance of the city of Milwaukee is substantially the same as in *Com. v. Bank*, *supra*. It is a simple declaration that they shall pay a license fee of \$10 per annum before any cars shall be run on the road. See also *Railway Co. v. Philadelphia*, 101 U. S. 528-536, 83 Pa. St. 429-433. Very many cases might be cited showing the strictness of the rule in construing a legislative act when it is insisted that such act amounts to an irrepealable contract, in all cases where it is alleged that the act takes away the taxing power. If we were not satisfied that the rights of the corporation in this case must be subject to the right of the

legislature to alter or repeal the same under our constitution, and that the legislature did, by the repeal of chapter 313, Laws 1860, and the enactment of section 1862, authorize the city of Milwaukee to do just what it has done, we should be inclined to hold that in the absence of any constitutional inhibition upon the legislature to bind itself in granting the charters to corporations, that the ordinance of 1874 was not an irrevocable contract made between the city and the corporation, but simply a contract to pay a license fee of \$10 until the common council should see fit in its wisdom to increase or diminish the same. The order of the superior court of Milwaukee county is affirmed.

APPEAL OF WILLIAMSPORT PASSENGER R. CO.

(Pennsylvania Supreme Court, April 16, 1888.)

Street Railways—Franchise—Repeal.—Sec. 9 of art. 17 of the Pa. Const. of 1874, and the act of May 23, 1878, sec. 16, providing that no street passenger railway shall be constructed within the limits of any city, borough, or township without the consent of the local authorities therefor, has no application to a street railway company which was chartered and had made large expenditures before the adoption of the constitution of 1874, but subsequent to the constitutional amendment of 1867, which amendment only authorized a repeal for cause and on just terms, and did not operate to change the charter of such company, so as to make the consent of the city council a condition precedent to the laying of its tracks in the city, according to its original charter.

APPEAL from the Lycoming County Court of Common Pleas, from an order of the court granting a preliminary injunction upon the ground that consent to lay the tracks of the Williamsport Passenger R. Co. had not been obtained from the city, and from an order continuing the same. The facts are sufficiently stated in the opinion and decree of the court of common pleas.

The following is the opinion and decree of the court of common pleas:

"The plaintiff, the city of Williamsport, is a municipal corporation of the fourth class, chartered under and by virtue of an act of assembly, commonly called the 'Wallace Law,' approved May 23, 1874 (P. L. 230), and its several supplements. Prior to its acceptance of said act of assembly, it was a city incorporated by an act of assembly which became a law January 15, 1866 (P. L. 1231), before which time it was called the borough of Williamsport. The defendant, the Williamsport Pas-

senger R. Co. was incorporated by an act of assembly approved April 15, 1863 (P. L. 1864, p. 1080), whereby, *inter alia*, it was given power 'to lay out and construct a railway commencing at Third and Market streets, in the borough of Williamsport, Lycoming county, and continuing westwardly along Third street, or any other street in said borough, to the village of Newberry, in said county, and eastwardly through said Third street, or in any other street or streets in said borough, as may be deemed advisable by the said company, to and through the borough of Montoursville, with the right to construct branches to the main track of said passenger railway through any of the said streets of the borough of Williamsport, with single or double track: . . . provided, that the borough councils may, from time to time, by ordinance, establish such regulations in regard to said railway as may be required for grading, culverting, and laying of gas and water in and along said streets, and to prevent obstructions thereon.' It was also provided that 'said company, in constructing said road, shall conform to the grades now established, or hereafter to be by law established, of the several streets, roads, or avenues traversed by said road.'

"Pursuant to this authority, the company defendant organized, laid out, and constructed a railway commencing at Third and Market streets, in said borough; thence westwardly, in the direction of the village of Newberry, by Third street to Pine street, by Pine street to Fourth street, and by Fourth street to a point near its intersection with the Philadelphia & Erie R., and from the starting point at Third and Market streets eastwardly, in the direction of the borough of Montoursville, on said Third street, to a point near its intersection with the Philadelphia & Erie R. They also constructed branches on Campbell street and Herdic street. The company defendant has expended large sums of money in the construction, repair, and maintenance of its road, and has had the same in operation since the year 1864, but has not since that time built any extensions of its main lines or branches into or through any other streets or parts of streets of said borough, now city. On the 9th day of February, 1887, the railway company defendant determined to lay additional branches to its main line in streets not heretofore occupied by said company, and entered into contracts with competent parties to furnish all material and do said work, in pursuance of which said company has incurred considerable expense and liability; and on the 21st of February, 1887, proceeded to place their rails upon and along the streets they intended to occupy by other proposed branches. After giving said company notice not to put their rails on said streets, nor proceed with said work, the city of Williamsport filed her bill in equity in this

case, wherein, after stating some of the foregoing facts, it is charged that said company defendant holds its charter subject to section 9 of article 17 of the constitution of 1874, and section 16 of an act to provide for the incorporation and government of street railway companies in cities of the third, fourth, and fifth classes, etc., approved May 23, 1878 (P. L. 111), which sections of the constitution and act of assembly are in the same words, as follows: 'No street passenger railway shall be constructed within the limits of any city, borough, or township, without the consent of the local authorities thereof.' It is further charged in said bill that the company defendant has not obtained the consent of the local authorities of the city of Williamsport to construct its proposed extensions; that, without such consent, the occupation of its streets by said company will be unlawful, and therefore will be a public nuisance, etc.; wherefore it is prayed that said company may be restrained, etc., on said bill, and the injunction affidavits then filed. A preliminary injunction was granted, and a day fixed for further hearing in the premises, at which time an answer was filed by the defendant, and numerous affidavits and exhibits were filed by both parties. The answer contains some of the facts hereinbefore recited, and substantially admits the facts stated in the bill. It admits that it has not obtained the consent of the local authorities of the city of Williamsport and avers that such consent is not necessary. It denies that the construction of said branches will be without authority of law, etc., but avers that the defendant has lawful authority to construct said branches, and therefore that such occupation of the streets will not be a public nuisance; wherefore it is prayed that the plaintiff's bill may be dismissed, etc.

"On the argument many questions were discussed, which it is not deemed necessary to examine *seriatim*, but which are disposed of by the following general observations: It is not charged that the company defendant threatens or intends to disregard the established grades of the streets it desires to occupy; nor that it intends by its proposed branches to violate or disregard any ordinance of the city regulating its occupancy of said streets. It does not appear that the city has ever adopted any regulations or ordinance on the subject. The village of Newberry and the borough of Montoursville did not adjoin the borough of Williamsport; hence the company defendant had authority to cross the intervening space to reach its *termini*, and this right could not be affected by the extension of the borough or city limits so as to include the whole or any part of such intervening territory. If the section of the constitution and the act of assembly before recited do not apply to the defendant, then its right to determine what streets of the city it will occupy is vested in the company; and, indeed, is expressly re-

served to the company in its charter, where it is declared that it may occupy such street or streets as may be deemed advisable by the company.

"The company defendant was incorporated in 1863, and is subject to the permission of the act of assembly of May 3, 1855 (P. L. 423 ; Purd. Dig. 352. p. 82), and is also subject to the following constitutional amendment of 1857: 'The legislature shall have the power to alter, revoke, or annul any charter of incorporation hereafter conferred by or under any special or general law, whenever in their opinion it may be injurious to the citizens of the commonwealth ; in such manner, however, that no injustice shall be done to the corporators.' No rule of law in this state requires a railroad corporation to exercise all the powers contained in its grant in the beginning, or declares that those powers which are not then exercised are lost, unless the statute expressly provides for the forfeiture of a charter at the suit of an individual. Only the government can assert the right to have it forfeited, and then it must be done in a proper proceeding commenced for that purpose. The courts interfere by injunction to prevent wrongs of a repeated and continuing character. In a case where the public rights, or private rights secured by statute or by contract, are invaded, and an injunction asked for in order to protect them, no question of the amount of damage is raised ; but simply one of right. When railroad companies or individuals exceed their statutory powers in dealing with other people's property, no question of damage is raised when an injunction is applied for, but simply one of an invasion of right. *Com. v. Railroad Co.*, 24 Pa. St. 159 ; *Railroad Co.'s Appeal*, 5 Atl. Rep. 872.

"This brings us to the consideration of the real question in this case, viz., has the company defendant lawful authority to extend its lines or build branches in the streets of the city of Williamsport without the consent of the city authorities? If it has such authority, then the preliminary injunction granted must be dissolved, and the plaintiff's bill dismissed. If it has not such lawful authority, then the preliminary injunction must be continued. The original charter of the company does not require that the consent of the local authorities shall be obtained to allow it to build its tracks in the streets. On the contrary, this power is expressly given to the company. The Williamsport Passenger R. Co. is certainly not required to obtain the consent of the city authorities to occupy its streets, unless its charter is to be construed as subject to section 9 of article 17 of the constitution of 1874, or the statute of 1878 in the same words, viz.: 'No street passenger railway shall be constructed within the limits of any city, borough, or township without the consent of the local authorities.' Whether or not

this constitutional or statutory prohibition applies to the company defendant depends upon whether the reasoning and the authority of the supreme court in the cases of *Railroad Co. v. Duncan*, 5 Atl. Rep. 742, and *Railroad Co. v. Patent*, Id. 747, apply to the case at bar. Prior to these decisions, it had been frequently held that railroad companies whose charters, like the Pennsylvania R. Co. and Philadelphia & Reading Co., in the exercise of the power of eminent domain, required them to make compensation for land entered upon, used, or taken, were not liable for consequential damages. By the cases cited, it is decided that the companies therein named are now liable for consequential damages, because their charters are to be construed as subject to section 8, article 16, which declares that 'municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction of their works,' etc. The effect of these decisions is that the charters of the companies named, which required that they make compensation for lands entered upon, used, or taken, must now be so read that they shall make compensation for lands entered upon, used, taken, injured, or destroyed. Mr. Justice Gordon, in delivering the opinion of the court in the case of the Railroad Co., *supra*, after giving at length his reasons for the conclusions arrived at, says: 'We therefore rest our decision on what we deem its legitimate ground; that is, that the act of 1855, and the constitutional amendment of 1857, must be taken to be as much part of the defendant's organic law as though written therein; and, as a consequence, as well the constitutional convention [of 1873] as the legislature had the power to subject the company's exercise of the right of eminent domain to the provision that it make just compensation, not only for the property which it might choose to take in the strict sense of that word, but also for such as it may injure or destroy.'

"After a careful study of the cases just cited, containing, as they do, the last deliverance of our supreme court on the subject, I am of opinion that they rule the case at bar. Thus I arrive at the conclusion that the Williamsport Passenger R. Co. may not lawfully construct its railways on the streets of the city of Williamsport without the consent of the city authorities.

"Preliminary injunction continued until final hearing or further order of the court."

J. G. Reading, Linn & Crocker, and H. C. & S. T. McCormick for appellant.

J. J. & V. A. Metzger and H. W. Watson, City Sol., for appellee.

PAXSON, J.—It is not denied that the charter of appellant's company gives it the power to lay its tracks upon the streets in question; and, if it were denied, it would not matter, as such power is expressly conferred. The city of Williamsport, appellee, contends that it has no right to do so without the consent of city councils first had and obtained; and refers us to section 9 of article 17 of the constitution of 1874, and to the act of May 23, 1878, § 16 (P. L. 111), as authority for this position. The constitutional provision and act of assembly referred to are in substantially the same language, viz.: "No street passenger railway shall be constructed within the limits of any city, borough, or township without the consent of the local authorities thereof." The appellant company was chartered by act of April 15, 1863 (P. L. 1080), and has expended a considerable amount of money on the faith of its charter. It had entered into contracts involving still further expenditure, and for the purpose of extending its road, and had incurred serious obligations on account thereof, when its operations were arrested by the injunction of the court below, issued at the instance of the appellees. There is nothing in the company's charter which makes the consent of councils a prerequisite to the exercise of its corporate powers in the extension of its road. Hence we have the question, clearly cut, whether its charter is affected by either the constitutional provision or the act of assembly referred to. If the charter of the company remains in full force, as originally granted by the commonwealth, its rights to extend its tracks as proposed is too clear for argument. It has been said by this court, on more than one occasion, that the constitution of 1874 did not, *ipso facto*, repeal charters. This principle was expressly ruled in *Hays v. Com.*, 82 Pa. St. 518, in a very clear opinion by our Brother Gordon; and the same thought was expressed by the same judge in *Railroad Co. v. Duncan*, 111 Pa. St. 352, where he said: "We also agree that the framers of the constitution of 1874 did not intend to violate the laws of the federal government, or to repeal the provisions of any charter granted by the legislature of Pennsylvania." That this case was not intended to assert the doctrine that the constitution repealed existing charters, the extract I have given fully shows; nor was it intended to overrule *Hays v. Com.*

It was urged, however, that appellant's charter postdates the constitutional amendment of 1857, which provides that "the legislature shall have the power to alter, revoke, or annul any charter of incorporation hereafter conferred by or under any special or general law, whenever, in their opinion, it may be injurious to the citizens of the commonwealth; in such manner, however, that

Case stated.

Constitution did not repeal charters.

Effect of constitutional amendment of 1857.

no injustice shall be done to the corporators;" and that the appellant's charter is subject to this provision, and to appropriate legislation to enforce it. I concede all this; but I do not understand that the act of 1878 was intended to enforce this amendment, or to repeal the charter of the appellant. The amendment of 1857 did not give an arbitrary power to the legislature to repeal charters at will. It only authorizes such repeal for cause. It can only be done where the charter is injurious to the citizens of the commonwealth, and such reason should appear in some way as the moving cause which induced the legislature to take such action. And, even where such cause appears, the charter must be revoked or annulled in such manner, and no other, "that no injustice shall be done to the corporators." That I am right in this construction of the amendment of 1857 was clearly shown by our Brother Gordon in his opinion in *Hays v. Com.*, where he says, at page 523: "It is said, however, that, by the amendment of 1857, the legislature has the power to alter or revoke the charter of this corporation. Be it so. It may be an answer to say that a constitutional convention is not the legislature in the meaning of that amendment. If, however, it were such, it could only make such alteration or revocation, when it was made to appear that the charter, in the part proposed to be revoked or altered, was 'injurious to the citizens of the commonwealth;' for the legislature cannot act arbitrarily in a matter of this kind, and impose its own will as the *ultima ratio*. In the case last above cited [*Com. v. Railroad Co.*, 58 Pa. St. 26], Mr. Justice Sharswood sets it down as a rule, settled not only by judicial but by legislative authority, that the legislature is not the final judge of whether the *casus fœderis*, upon which the authority to repeal is based, has occurred. As there is in this case no allegation of a breach of any condition under which the Pittsburgh & Castle Shannon R. Co. accepted its charter, or that that charter is in any particular obnoxious to the welfare of the citizens of this commonwealth, it cannot be successfully urged that it may be revised or abrogated by any state authority whatever. But the constitutional convention claimed for itself no such power. On the other hand, it has expressly set down (act 2 of the schedule) that all rights, actions, prosecutions, and contracts shall continue as if the constitution had not been adopted. And by the second section of the sixteenth article it is manifest that the convention did not intend to subject any private corporation to any of the provisions of the constitution which might in any degree change the charter thereof. If otherwise, why say: 'The general assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend the same, or pass any other general or special law for the benefit of such corporation, except upon the condition

that such corporation shall thereafter hold its charter subject to the provisions of this constitution?' This section is so comprehensive and clear that nothing is left for surmise or doubt. Charters of private corporations are left exactly as the new constitution found them, and so they must remain until the companies holding them shall enter into a new contract with the state by accepting the benefit of some future legislation. It is only on the theory that the manner of voting is not material that the cumulative system is sought to be saddled on this corporation; but, if this company does not hold its charter subject to the provisions of the present constitution, how can it be made subject to any one of its provisions, material or immaterial?" *Hays v. Com.* received the assent of six judges of this court; only the late Justice Woodward dissenting. It is sound law, and must stand.

Our conclusion is that the charter of the appellant is not affected by the constitution of 1874 or the act of 1878. It follows that it was error to grant the injunction.

We have departed, in this instance, from our rule not to discuss cases coming here upon appeals from preliminary injunctions. This appeal presents a question of law only. There are no facts in dispute. The report of a master under such circumstances could not aid us. We have all the light now we could have upon the final hearing. In addition, we have been earnestly requested by the counsel on both sides to treat the decree as final.

The decree is reversed, at the costs of the appellee, and the injunction dissolved.

Reservation of Right to Repeal or Amend Charters.—See, *ante*, *People v. O'Brien*, 78, and note, 107.

DES MOINES STREET R. CO.

v.

DES MOINES BROAD-GAUGE R. CO.

(*Iowa Supreme Court, June 24, 1888.*)

Street Railway—Franchise—Forfeiture of Privileges.—City authorities who have been enjoined from interfering with the extension and operation of a street-railway line are not justified in interfering therewith by resolutions subsequently passed by the city council, to the effect that all street railroads shall be of the standard or broad gauge, and declaring the privileges of the company forfeited for violation of the ordinance under which they were granted; and proposing the passage of another ordi-

nance, granting the company the right to operate its road upon terms and conditions materially different from those contained in the original ordinance.

Same—Gauge of Track—Alteration by City.—A city which has for fifteen years permitted, without objection, a street-railway company to lay its track of a certain width or gauge, pursuant to an ordinance which prescribes no particular gauge, has no power to require such company to construct its additional track of a different gauge.

Same—Violation of Injunction—Punishment.—The punishment of city authorities for contempt in disobeying a decree of court, believing it their duty to do so under resolutions and ordinances of the city, will be merely nominal, upon condition that they will in future comply with the decree; but they will be required to pay costs.

PROCEEDINGS for contempt in violating an injunction—

The facts sufficiently appear in the opinion.

Parsons & Perry and *Kauffman & Guernsey* for plaintiff.

Cummins & Wright and *J. H. Detrick* for defendant.

PER CURIAM.—At a prior term of this court, in certain causes therein pending, in which the plaintiff, the defendant railway company, and the city of Des Moines were parties, a decree was entered enjoining and restraining the city of Des Moines, the mayor and marshal thereof, and their successors in office, from “interfering in any way with the construction, extension, or operation, by animal power, of the plaintiff’s line of street railway upon any of the streets of the city of Des Moines: provided, this decree shall not be held to operate as a restraint upon the city of Des Moines of a proper police and equitable control over the streets of said city, and the power to make reasonable regulations as to the manner of construction of said lines, the places in the streets where the same shall be located, and the character and extent of service that shall be furnished thereon.” Subsequent to entering such decree, and on the 25th day of May, 1888, when the plaintiff was engaged in laying down its railway track along and upon Grand avenue, a street in said city, the defendant, William L. Carpenter, mayor, and Alfred Jarvis, marshal, thereof, interrupted and arrested, or caused to be arrested, men in the employ of the plaintiff, and engaged, under its direction, in laying down said track; and the plaintiff claims that, in so doing, the said Carpenter and Jarvis are in contempt of the authority and decree of this court, and the object of this proceeding is to punish them therefor. In response to a rule to show cause why they were not in contempt, the said Carpenter and Jarvis admitted that they had caused the arrest of the employees of the plaintiff, and had interrupted and prevented it from laying down its track upon said avenue, and justified the same, under and by virtue of certain resolutions of the city of Des Moines. It appears from the record that the gauge of the plaintiff’s road

is three and one-half feet, and that such gauge was adopted, as the plaintiffs claim, under and by virtue of an ordinance of the city, passed in 1866, granting the plaintiff the exclusive right to lay its tracks in the streets of the city, and operate the same with animal power. The ordinance failed to prescribe the gauge of the road, but it is a conceded fact that the plaintiff adopted the gauge, laid its tracks, maintained and operated the same, for the last 15 years, without objection upon the part of the city, until the passage of the resolutions relied upon by said defendants in justification of their acts. There is nothing in the record showing that any other gauge of road was ever used or operated by the plaintiff under said ordinance. On the 23d day of May, 1888, the city council passed a resolution declaring that all street railroads occupying or desiring to occupy the streets of the city, the track thereof shall be so laid that the same shall be of the standard or broad gauge—four feet eight and one-half inches wide. The declared object of this resolution was to “protect the rights of the travelling public against a great nuisance and obstruction of travel.” On the succeeding day the city council adopted a preamble and certain resolutions which are quite lengthy. The substance of the preamble, or recital of facts upon which the resolutions are based, is that the plaintiff had in many specified particulars violated the ordinance of 1866, and therefore the council, by the adoption of the resolutions last referred to, declare all rights of the plaintiff under said ordinance forfeited, and directed an action to be commenced to enforce the forfeiture, and the plaintiff was forbidden and prohibited from operating its road or laying down any tracks in the streets of the city. After the issuance of the rule to show cause, the city council adopted another preamble and resolutions not materially different from those last above referred to, except that the object and purpose of the council is declared to be that the forfeiture declared should not take effect until the passage of an ordinance, which is set out in the record, granting the plaintiff the right to operate its road by animal power upon certain terms and conditions materially different from the ordinance of 1866. The foregoing is a sufficient statement of the material facts, and counsel have elaborately argued the questions involved. We are pressed for, and the necessities of the case seem to require, an early decision. We therefore deem it best to briefly state our conclusions, without, for the want of time, stating our reasons therefor, or the citation of authorities in support of our conclusions.

1. Under the pleadings and issues in the actions on which the
 Conclusions of
 court. decree of this court is based, we have a clear conviction that the city, and officers thereof, were, by such decree, enjoined from interfering with, or in any manner pre-

venting, the plaintiff from laying its track on Grand avenue so as to connect its system of road on the east and west sides of the Des Moines river.

2. That the resolutions passed by the city council since the rendition of the decree, and the proposed passage of the additional ordinance, afford no excuse or justification of the acts of the mayor and marshal.

3. We have not considered the right of the city to forfeit the contract, or whether the matters relied on justify the same, or whether the city has authority to forbid the laying down of any street railway in any street, or part of a street, in the city.

4. We are of the opinion that the city does not now have the power to require the plaintiff to lay down such additional track as it may desire to, on a different gauge from that heretofore in use.

5. We are satisfied that William L. Carpenter, mayor, and Alfred Jarvis, marshal, of the city of Des Moines, disobeyed the decree of this court, for the reason only that they believed it their duty to do so under the resolutions and ordinances of the city. Therefore they should not be punished except nominally, provided they will not further interrupt the plaintiff in laying down its track on Grand avenue; and their assurance in writing, filed with the clerk, that they will not do so, will be regarded as sufficient. They, however, must pay costs.

Railway in Street—Change of Gauge.—As to change of gauge by a street railway company, see, *post*, *Denver & S. F. R. Co. v. Domke*.

STATE *ex rel.* Attorney-general

v.

MADISON STREET R. CO.

(*Wisconsin Supreme Court, November 8, 1888.*)

Street Railway—Franchise—City Ordinance—Forfeiture.—A city ordinance requiring a city railway company to construct its road in a particular manner and on certain streets, passed pursuant to sec. 862, Wis. Rev. Stat., providing that any municipal corporation may grant to any such corporation, under whatever law formed, such use, and upon such terms as the proper authorities shall determine, of any streets within its limits for the purpose of laying its tracks, etc., and that every such road shall be constructed upon the most approved plan and subject to such reasonable rules and regulations, and the payment of such license fees as the proper municipal authorities may by ordinance from time to time prescribe, has

the force and effect of a statute, and becomes a part of the charter of the company, upon non-compliance with which it may be compelled by a *quo warranto* proceeding to surrender its franchises.

APPEAL from Dame County Circuit Court.

Action by the state of Wisconsin, and relation of Charles E. Estabrook, attorney-general against the Madison Street R. Co., to vacate its charter and wind up its affairs.

Appeal from demurrer overruling petition.

Gregory, Bird & Gregory for appellant.

C. E. Estabrook, Atty. Gen. (*R. G. Siebecker*, City Atty., and *Pinney & Sanborn*, of counsel,) for respondent.

ORTON, J.—This is an action brought by the attorney-general in the circuit court, by leave of the court, for the purpose of vacating the charter, and annulling the existence of the defendant as a corporation, and for the purpose of having

Case stated.

a receiver appointed, and of winding up its affairs. The defendant demurred to the complaint, and the demurrer was overruled, and from said order this appeal is taken. The material allegations of the complaint are, in substance, as follows: By an ordinance of the common council of the city of Madison, authority and permission was given to the defendant to lay and maintain, within certain streets of said city, a street railway, within certain specified times, in a good and substantial manner, and in accordance with the approved plans for the construction of any such road, and to obviate as far as possible any obstruction or hinderance to any other purpose or use of said streets; and that the cars to be run on such railway and other equipments to be used, should be of the best class and style in use on such railway; and that the railroad track and rails should at all times correspond with the actual grade of the streets, and should be so laid and maintained that carriages and other vehicles could easily and freely cross said tracks at all points and in all directions, without obstruction, and should keep the space between the rails, and of one foot outside of them, so as not to interfere with travel, in as good condition as the street outside of said tracks, and to correspond with the same. The said company was also required by said ordinance to lay and maintain a railway from the intersection of Park street, with University avenue, along said avenue, to the fair-grounds, within a certain time mentioned. These and other requirements of said ordinance are made conditions of the franchises granted to the company thereby. The company built a railway on the streets and within the time mentioned; but it did not build, and has not built and maintained, the same in a good and substantial manner, or in accordance with the approved plans for the construc-

tion of any such railway, or with equipments of the best class and style in use on such railway, in this: that it used a rail called the "T" rail, which is not the best and most approved style of rail in the construction of such a railway, but it impairs the use of said streets by reason of its elevation above the surface of the same, and makes it difficult to cross over with carriages and vehicles to such a degree as to be dangerous. The said company has not kept the space between the rails, and of one foot outside, to correspond with the grade of the streets, but such spaces have been left depressed considerably below the surface of the streets, so as to make the track difficult and dangerous to cross over. The said company has not maintained a railway from the intersection of Park street and University avenue to the fair-grounds, but have ceased to use the same, and have abandoned it, leaving the street in bad condition; and the company has failed to indemnify or defend the city in and from suits for damages occasioned by such bad condition of said railway, and so caused, as required by said ordinance, and the city is harassed by actions commenced for such cause, and is threatened with many more of such actions.

To sustain the demurrer, or rather to reverse the order overruling the same in this court, the learned counsel of the appellant relies only on the main ground that the complaint does not state a cause of action. The contention of the learned counsel is, in short, that the ordinance confers no corporate privileges or franchises, and that it is a mere contract between the company and the city, for a breach of which the city has the usual remedy by action; and that the company has not offended against the provisions of any law by or under which it was created, as the only possible cause, at this time, mentioned in the statute for a forfeiture of its charter, and for this proceeding against it, in the nature of *quo warranto*.

Contention of
appellant.

The acceptance by the company of these conditions of the ordinance constitutes a contract without doubt, and so does the acceptance of a legislative charter by the incorporators; but it is clearly something more, and above a mere contract. By the peculiar provisions of our statute under which the defendant became incorporated, there does not seem to be any doubt but that this ordinance, which conferred upon the company these privileges and franchises, has the force and effect of a statute of the state, and is essential to its very corporate existence. The only object and purpose of its incorporation are to run and maintain a railway in and along the streets of the city of Madison, and they depend upon this ordinance. Without the rights and privileges granted by it, or after it has forfeited them, the corporation fails to exercise its powers as a corporation, and has forfeited its charter and

Ordinance
granting fran-
chise has effect
of statute.

may be proceeded against under the third subdivision of section 3241, Rev. St. The company was organized under the general law (chapter 86, Rev. St.), and the first requirement is a declaration of its business and purposes, and such business and purposes were declared to be to build and maintain a street railway in the city of Madison. If the company cannot do this, it can do nothing. It follows that it depends upon this ordinance for its corporate existence; and if it has so violated the conditions of the ordinance as to have forfeited its rights and privileges under it, it has *ipso facto* forfeited its charter, or, in other words, the right to do anything as a corporation. But the ordinance has the force and effect of a law of the state by the terms of the statute itself. All such ordinances are declared by the charter to have such effect, and it has such force and effect by becoming a part of the statute by its own terms, and is embodied in it. By section 1862, Rev. St., "corporations for constructing," etc., "street railways may be formed under chapter eighty-six, and shall have powers and be governed accordingly. Any municipal corporation may grant to any such corporation, under whatever law formed, such use, and upon such terms, as the proper authorities shall determine, of any streets within its limits, for the purpose of laying single or double tracks, and running cars thereon, for," etc. "Every such road shall be constructed upon the most approved plan for such roads, and shall be subject to such reasonable rules and regulations, and the payment of such license fees as the proper municipal authorities may by ordinance from time to time prescribe." This statute requires obedience to such an ordinance. To act in accordance with its rules and regulations is the condition as well as the purpose of its incorporation. The charges of misconduct and failure of corporate duty in the complaint are so many failures to comply with this statute in constructing and maintaining a road upon the most approved plans for such roads, and are, as well, violations of the conditions of the ordinance. The last clause of this section provides that any grants heretofore made by any municipal corporation not having the authority to do so are thereby in all respects confirmed. This shows most clearly the effect of the statute as a confirmatory one, as well as a grant of power. It confirms the ordinance, imports it, and makes it a part of itself. The statute declares that the company shall be subject to such rules and regulations; that is, shall comply with the ordinance, and perform its conditions, if they are reasonable. A violation of the ordinance is a violation of the statute. It is too clear for argument that the effect and purposes of such a corporation, to be secured only by obedience to the ordinance, are of public interest, and the legislature has shown the interest of the state in them by this special legislation.

Violation of ordinance is violation of statute—Franchises forfeited.

The statute alone answers the argument of the learned counsel, without reference to authorities and adjudged cases. We may refer, however, to some general principles applicable to such cases where the statute may not be so explicit. The common council, in passing the ordinance, acted as the agent of the state, and as public officers, by virtue of such delegated authority. The streets are for the public use, and so also are the street railways, affording increased advantages and facilities to the public, and they are primarily under the control of the legislature, and the power of the municipalities in respect thereto is entirely derived from the legislature. *Schults v. Milwaukee*, 49 Wis. 259, 5 N. W. Rep. 342; *Little v. Madison*, 49 Wis. 605, 6 N. W. Rep. 249; *Williams v. Yorkville*, 59 Wis. 119, 17 N. W. Rep. 546; 2 Dill. Mun. Corp. § 655; *Kittridge v. City of Milwaukee*, 26 Wis. 46; *Griggs v. Foote*, 4 Allen, 195. These and other cases cited in respondent's brief sustain these principles. If this corporation has assumed the performance of these public duties, it cannot neglect them without incurring a forfeiture of its franchises. 2 Mor. Priv. Corp. § 1018; *People v. Road Co.*, 23 Wend. 254. Information in the nature of *quo warranto*, presented by the attorney-general in behalf of the state, is the proper remedy in all cases of non-feasance, of mal-feasance, or abuse of power, and misuse of privileges, by a corporation chartered by the state, and ouster the proper judgment. *Reed v. Canal Corp.*, 65 Me. 132. The immunities and privileges granted to the company by the ordinance are as much the franchises of the corporation as if they had been directly granted by the statute under which it was organized. The common council of the city of Madison is authorized to grant them by the statute, and such power is a delegated one. What the common council does within that power is done by the legislature through its agency. The public has an interest in these franchises; the power to grant them, therefore, must be derived from the legislature. *People v. Railroad Co.*, 24 N. Y. 261; *Bank v. Earle*, 13 Pet. 519; *Ang. & A. Corp.* § 4. In the very able brief of the learned counsel of the respondent are fully discussed the various questions connected with the main ground of this action, with numerous references to authorities, to which reference may be had. I have already availed myself of the brief, and have condensed its matter, so as to make this opinion reasonably short. The various questions discussed are very important and interesting, but the case seems to be very clear, under the statute itself. The complaint shows that the defendant, as a corporation, has offended against the provisions of the law under which it was created, by not complying with the reasonable rules and regulations contained in the ordinance, and has therefore forfeited its franchises, and may be proceeded against in this manner, according to section 3241, Rev. St., and subdivision 1.

The demurrer was properly overruled. The order of the circuit court is affirmed, and the cause remanded for further proceedings according to law.

Grant of Franchises to Street Railway by Municipality.—See, *ante*, State v. Hilbert, 118.

Forfeiture of Franchises by State for Misuser.—See State v. Minnesota Cent. R. Co., 29 Am. & Eng. R. R. Cas. 440, note 451; State v. Atchison, etc., R. Co., 32 Ib. 388; State v. Hazleton, etc., R. Co., 14 Ib. 51; Attorney-general v. Erie, etc., R. Co., 16 Ib. 652.

BOROUGH OF STAMFORD

v.

STAMFORD HORSE R. CO.

(Connecticut Supreme Court of Errors, June 26, 1888.)

Street Railways—Franchise—Designated Streets.—A street railway company whose charter specifies a certain number of terminal points in different quarters of the city or borough, between which the company may lay its tracks, specifying the particular streets through which tracks may be laid, omitting one street named in the petition and adding two others not named therein, and concluding "and from and across any highway within any of the points of commencing or termination aforesaid," cannot construct its tracks through any street not specified.

Same—Laying Track in Unauthorized Street—Injunction.—An injunction will be granted at the suit of a borough to prevent the laying of street railway tracks in streets not authorized by the charter of the company, notwithstanding that the borough has power to remove the tracks when laid.

CASE reserved from Fairfield County Supreme Court.

This is a bill by the borough of Stamford for an injunction to restrain the Stamford Horse R. Co. from laying its tracks on a certain street.

A section of the charter of the company specified four terminal points in different parts of the borough between which the company might lay its tracks on the particular streets through which the road might run and concluded as follows: "And from and across any highway within any of the points of commencing or termination aforesaid," the suit was originally commenced in the Fairfield county supreme court and was reserved for the advice of this court.

F. Fessenden and *N. C. Downs* for plaintiff.

J. B. Curtis and *R. A. Fosdick* for defendant.

PARDEE, J.—The defendant company, claiming that every street in the borough of Stamford included within lines drawn from the northern terminus established by its charter to the eastern, thence to the southern, thence to the western, was subjected to its uses by the terms of its charter, began in 1887 to lay its track in Bedford street, without previous permission by the plaintiff, and had completed the same to within 50 feet of the end of the street, when the work was stopped by the present injunction. It presses the same claim upon this court. The defendant gave public notice in advance to the inhabitants of the borough as to the streets by name upon which it desired leave to impose its tracks. Its petition repeated the list; and the legislature scrutinized it, and for reasons satisfactory to itself excluded one street asked for, added by name two not originally asked for, and granted leave to pass over certain streets by name. In view of this laborious effort to put precise limitations to this grant to a private corporation to take for its own profit without compensation something from the absolute right of the public to the use of highways, it is impossible to find in the words cited legislative permission or intent to subject without name to the use of the defendant, not only the streets for which it asked, and which the legislature excluded from the grant, but also practically every street in the borough unnamed. The canons of interpretation require us to find in the last clause a meaning which puts it in accord with, in explanation and in furtherance of, the manifest intent to grant some streets by name and reserve all not named. That meaning is upon the surface. The words referred to are not necessary; the grant would be perfect in their absence. Like many words in charters, deeds, contracts, and pleadings, they are inserted from abundant caution; to protect the defendant from any assertion of claim that it had not the right to lay its track over or across any intersecting street. They add no street to the number of those specified by name. The public have the absolute right to the fullest legal use of every part of the highway. The defendant, a private corporation, in the absence either of legislative or municipal permission, has no right to impose a permanent structure thereon, and thereby sequester to its exclusive use for its exclusive profit any portion thereof.

The borough, as the instrumentality by which the governmental duty of constructing and maintaining highways is performed, as the guardian for the public of the highways dedicated to or purchased for its use, is entitled to an injunction against such an act by such a corporation for the sole reason that it is an unauthorized exclusion of the public from some portion

Permission
given by the
legislature.

Borough en-
titled to in-
junction to
prevent unau-
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cupation.

of the way; and this regardless of the question as to the greater or less degree of inconvenience or danger or expense thence resulting to the public. Moreover, the borough is charged with the duty and clothed with the power to maintain the highways within its limits in a reasonable condition of safety for travellers. Upon it is the responsibility for failure to perform this duty. The finding is that every horse-railroad track is of necessity "some impediment to the free and safe use of the street for travel with carriages," and that it may become a "serious and menacing obstacle to travel;" that is, it is certain to be dangerous in some degree, and may be greatly so. Inevitably there results to the plaintiff increased liability to damages and increased expenditure in protection and repairs. Upon the finding, as against the defendant, a trespasser, the plaintiff, both as it respects the portion of track already laid and the portion yet to be laid, is entitled to the presumption that the danger will be in the highest degree. The defendant, leaving it in uncertainty, must rest under the burden of doubt. For these reasons, too, the plaintiff is entitled to the writ; and none the less so because of its right to remove the track by force. As a rule, injunctions are denied to those who have adequate remedy at law. Where the choice is between the ordinary and the extraordinary processes of law, and the former are sufficient, the rule will not permit the use of the latter. In some cases of nuisance, and in some cases of trespass, the law permits an individual to abate the one and prevent the other by force, because such permission is necessary to the complete protection of property and person. When the choice is between redress or prevention of injury by force and by peaceful process, the law is well pleased if the individual will consent to waive his right to the use of force, and await its action. Therefore, as between force and the extraordinary writ of injunction, the rule will permit the latter. Certainly it should be no cause of complaint by the defendant that it is allowed peacefully to take up its track with the attendant care and economy, rather than that the plaintiff should do it by force. The defendant, without permission from either legislature or borough, without asking permission from either, and without notice to the latter, as a trespasser began to lay a track upon Bedford street. Immediately the plaintiff began to investigate the question as to its rights in the premises, and, upon receiving the advice of its attorney, instituted this proceeding. Laches is not found. We cannot find it as a fact, nor, upon the finding, impute it as a matter of law. The superior court is advised to render judgment for the plaintiff.

The other judges concurred.

Railways in Streets—Unauthorized Occupation.—As to right of railways to use the streets of a city for laying their tracks and to run their cars along,

see *ante*, *Adams v. Chicago, B. & N. R. Co.*, 7, and note, 16-20; and *Daly v. Georgia S. & F. R. Co.*, 20, and note, 27, 28.

In the case of *Hunt v. Chicago Horse and Dummy R. Co.*, 121 Ill., 638, it is said that by virtue of his common-law powers, the attorney-general of Illinois may maintain an action to restrain illegal occupation of a street by a railroad company, although that power or duty is not specifically prescribed by statute.

Injunction to Restrain Unauthorized Occupation of Streets.—See *Kavanagh v. Mobile & G. R. Co.*, 32 Am. & Eng. R. R. Cas. 267; s. c., note, 270.

SIoux CITY R. Co,

v.

SIoux CITY.

(*Iowa Supreme Court, October 2, 1888.*)

Street Railway—Franchise—Constitutional Law—Obligation of Contract.—Where a street railway company organized under a statute providing in substance that the privileges and franchises of corporations may be regulated, withheld, or subjected to the imposition of such conditions as the general assembly shall deem necessary for the public, and receives a franchise from the city authorizing it to construct a railway on its streets, and requiring it to pave between the rails, a subsequent statute requiring street railway companies in addition to paving between the rails, to pave one foot on each side, is not unconstitutional as being in violation of a contract obligation, but is an exercise of the reserved right of the legislature to alter the franchises of corporations.

APPEAL from Woodbury County District Court.

Accessory by the Sioux City R. Co. to an ordinance of Sioux City imposing an assessment on plaintiff's property. A demurrer to plaintiff's petition was overruled by the district court, and upon the plaintiff electing to stand thereon, judgment is rendered for plaintiff, from which judgment defendant appeals.

Joy, Wright & Hudson and *A. C. Strong* for appellant.

J. H. & C. M. Swan for appellee.

REED, J.—Plaintiff is a corporation, the object of its organization, as expressed in its articles, being "to locate, construct, maintain, and operate street and other railways within and adjacent to the city of Sioux City." On the 12th of December, 1883, the city council passed an ordinance granting and conferring upon plaintiff the right to locate, construct, operate, and maintain a street railway in certain streets of the city, upon certain specified terms and conditions. Section 11 of the ordinance is as follows: "Whenever by reso-

Facts.

lution of the common council, any street or part of street on which said track shall be laid and operated shall be ordered paved or macadamized, either at expense of the city or owners of abutting property, then the said proprietors of said street railway shall pave or macadamize, in the time and manner directed, the space between the rails, and shall thereafter keep the same between the rails in good repair, and shall keep in good condition and repair the space on all bridges that they cross." The company accepted the grant on the 18th of the same month, and immediately thereafter commenced the work of constructing its railway in the designated streets, and before the 15th of January, 1886, had expended in the work of construction the sum of \$10,000, and had several miles of road in operation. On this latter date the city became a city of the first class. On the 11th of May following the council passed an ordinance by which it is provided that whenever the city shall cause any street whereon a railway has been or may be constructed to be paved, the council shall order and provide that the company or person owning such railway shall pave the space between the rails, and for one foot in width on the outside thereof, at its own cost. The ordinance also contains provisions as to the manner of ordering said work, which is by resolution of the council, and the manner in which it shall be performed, and other matters relating to the same general subject. On the 25th of the same month an additional ordinance, containing further provisions on the subject, was passed. The council subsequently ordered certain of the streets on which plaintiff's railway is constructed to be paved, and on the 31st of August, 1886, it passed a resolution ordering and directing plaintiff to pave the space between its rails and for one foot in width on the outside thereof. The whole work of paving was done by a contractor under the city; and when it was finished plaintiff paid the cost of the paving in the space between the rails, but refused to pay any portion of the cost of the work outside of the track. The city thereupon proceeded to make a special assessment on its property to pay the cost of paving the space one foot in width on the outside of the rails, and the object of this proceeding is to test the legality of that action.

The positions of plaintiff are: (1) That the ordinance of December 12, 1883, upon its acceptance of the provisions thereof, become a contract between the parties; (2) that, as by the express provisions of the contract it was required to pave the space between the rails, the necessary implication is that it should not in the future be subjected to any burdens in addition to that growing out of the paving of the streets; and that such provision is as certainly a part of the contract as though contained therein in express

**Plaintiff's
contentions.**

language; and (3) that the subsequent legislation by which the additional burden is sought to be imposed upon it is an impairment of the obligations of the contract, and consequently is void.

The city council, in passing the ordinance of May 11th and 25th, and the resolution of August 31, 1886, and in making the subsequent special assessment on plaintiff's property, proceeded under chapter 20, Laws 20th Gen. Assem. The chapter is entitled: "An act granting additional powers to certain cities of the first class, with reference to the improvement of streets, highways, and alleys, and to provide a system therefor." It provides, among other things, that all cities of the first class which have been organized as such since January 1, 1881, or which may be organized after the passage of the act, shall have power to pave or otherwise improve any street, avenue, highway, or alley within their limits, and tax the cost of such improvements to abutting property; and prescribes the mode of procedure. Section 6 of the act contains the following provision: "All railway companies and street railway companies in cities of the first class, as provided in section 1 of this act, shall be required to pave or repave between rails and one foot outside of their rails, at their own expense and cost." It also provides that such paving shall be done at the same time, and shall be of the same material, as the paving of the balance of the street in which the track may be situated. It also requires street railway companies to use strap or flat rails in paved streets, and to keep the paving which they are required to lay down in good repair. It also provides that in case any such company shall refuse to construct any paving when so required by the city council, that the city shall construct the same and levy a special tax upon the property of the company within the city, to pay the cost and expense thereof. What was done by the city in the premises was in strict conformity with the provisions of the act. In our opinion the case turns upon the question whether the state had the right under its reserved powers to impose the additional burden upon plaintiff. When the plaintiff became incorporated the following statute was in force: "The articles of incorporation, by-laws, rules, and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged, or set aside by law; and any franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof whenever the general assembly

Provisions of statute under which council acted.

Act as to alteration of franchises.

shall deem necessary for the public good." Code, § 1090. The section occurs in the chapter relating to corporations for pecuniary profit, to which class of corporations plaintiff belongs.

That the state in granting a charter to a corporation may reserve to itself the power to repeal or amend the same, and that it may exercise such reserved power is well settled. *Sherman v. Smith*, 1 Black, 587; *Miller v. State*, 15 Wall. 478; *Holyoke Co. v. Lyman*, Id. 500; *Sinking Fund Cases*, 99 U. S. 700; *Bank v. Talcott*, 19 N. Y. 146. By the provision quoted above the state reserved the power, not only to repeal or amend the articles of incorporation of such corporations as should be organized after its enactment, but to impose such conditions upon the enjoyment of the franchises obtained thereunder as the general assembly might deem necessary for the public good. Plaintiff's franchise consists in the privileges, powers, and rights conferred upon it by the general statute and its articles of incorporation. But it assumed them subject to the right and power reserved to the state by the statute. The reservation was a condition of the grant. Now, the object of plaintiff's organization, as stated above, was to construct, maintain, and operate street and other railways in the city and adjacent thereto. The power and privilege of doing that particular thing are its franchise. The act of the twentieth General Assembly, as applicable to it, imposes it, as a condition upon which it may enjoy that franchise, that when the city determines that the street shall be paved, it shall bear the cost and expense of doing the paving between its rails and one foot in width outside of them. That the general assembly had the power under the reservation to impose the condition, we think there can be no doubt. If the city had made no provision in the original grant on the subject, the power of the state to impose the condition would hardly be doubted by any one; but if the power is reserved to the state, it could not be the subject of contract between plaintiff and the municipality. The state has not by any legislation on the subject delegated to the municipal corporations it has created any of the rights or powers reserved by the statute quoted above. The question here considered did not arise in *City of Des Moines v. Railway Co.*, 41 Iowa, 569. In that case the city had granted to the railroad company the right to occupy a toll-bridge with its railroad. The grant imposed certain conditions as to the use of the bridge, but contained no requirement for the payment of toll. After the specified conditions had been complied with, it attempted to enforce the collection of certain tolls, and we held that the ordinance imposing the tolls was an attempt by the city to impair the obligation of its contract, and was void. But no question as to the power of the state to im-

pose additional burdens or conditions on the enjoyment of the franchise was involved. And the same is true as to *City of Burlington v. Railway Co.*, 49 Iowa, 144. The judgment will be reversed.

Exercise of Reserve Power to Alter Charter or Impose Conditions.—See, *ante*, *People v. O'Brien*, 78, and note, 107.

CUMMINS, Trustee, *ex rel.* MAHAN, Supervisor,

v

EVANSVILLE AND TERRE HAUTE R. CO.

(*Indiana Supreme Court, September 20, 1888.*)

Railway in Street—Obstructing Highway—Crossing—Restoration.—The Indiana act of March 2, 1888, sec. 23, imposing a penalty of \$5 per day for the unnecessary obstruction of a highway, does not apply to a railroad company which lawfully crosses a highway with its track, although such company omits the duty imposed upon it by statute requiring the restoration to its former state as nearly as possible of a highway intersected by a railroad.

APPEAL from Sullivan County Circuit Court. The facts are stated in the opinion.

W. C. Hultz, Orion B. Harris, and John S. Bays for appellant.

John E. Iglehart and Edwin Taylor for appellee.

HOWK, J.—This suit was commenced by appellant, Cummins, trustee of Jackson township, of Sullivan county, upon the relation of William H. Mahan, supervisor of road-district No. 2, in said township, as plaintiff, against the appellee, as defendant, before a justice of the peace of said county. From the justice's judgment the cause was appealed to the court below. There defendant's demurrer to the complaint herein, for the alleged insufficiency of the facts therein to constitute a cause of action, was sustained. Plaintiff declined to amend his complaint or plead further, and thereupon the court adjudged that he take nothing by his suit, and that defendant recover of him its costs expended herein. In this court error is assigned by plaintiff upon the sustaining of the demurrer to his complaint herein. In his complaint plaintiff alleged that the defendant, on the 31st day of August, 1886, and on each and every succeeding day until the 9th day of October, 1886, unnecessarily,

Facts.

and to the hinderance of passengers, obstructed a certain public highway in road-district No. 2, of Jackson township, in Sullivan county, described as follows, to wit (description omitted), by then and there, and all of said time, building, constructing, and maintaining a railroad track in, upon, along, across, and over said highway, and by then and there, and all of said time, running and operating trains of cars, engines, and locomotives upon and over said line of railroad track, in such a manner as to then and there, and all of said time, interfere with the free use of said highway, and not to afford security for life and property; that the defendant then and there, and all of said time, utterly failed in every particular to restore said highway, so intersected, to its former state, and failed in every particular to restore said highway, so intersected, in a sufficient manner so as not to interfere with or impair its usefulness or injure its franchises; wherefore plaintiff demanded judgment for \$175, for an attorney's fee of \$5 for his attorney, and for all proper relief.

In the absence of averment to the contrary, it must be assumed, we think, that appellee was incorporated as a railroad company, under the provisions of the general laws of this state providing for the incorporation of such companies, and was and is pos-

Powers of defendant as to highway.

essed of the general and special powers which those laws expressly confer upon such corporations, "subject to the liabilities and restrictions" expressed therein. Among the powers so conferred, in the fifth clause of section 3903, Rev. St. 1881, in force since May 6, 1853, and still in force, it was and is provided that such a corporation shall possess the power to "construct its road upon or across any . . . highway, . . . so as not to interfere with the use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the . . . highway thus intersected to its former state, or in a sufficient manner not to unnecessarily impede its usefulness," etc. Under this clause of the statute, we are of opinion that appellee was fully authorized to build, construct, and maintain its railroad track over and across the highway described in the complaint herein, and to operate its line of track by running engines and trains of cars thereon. But it became and was appellee's duty, under the statute, to re-

Duty to restore crossing.

store such highway to its former state, or in a sufficient manner not to unnecessarily impede its usefulness. For the non-performance of this duty, the general laws of this state for the incorporation of railroad companies provide no penalty, and prescribe no remedy. It has been held by this court, however, and correctly so, we think, that the performance of such duty by the railroad company may be compelled by mandate. *Railroad Co. v. State*, 37 Ind. 489; *State*

v. Demaree, 80 Ind. 519; *Clawson v. Railroad Co.*, 95 Ind. 152; s. c., 20 Am. & Eng. R. R. Cas. 56. On the 2d day of March, 1883, an act of the general assembly of this state was approved, and became a law, entitled "An act concerning highways, and supervisors thereof." In section 23 of such act, so far as it can be claimed to apply to the case under consideration, it is provided as follows: "Any person who shall . . . unnecessarily, and to the hinderance of passengers, obstruct any highway, . . . for every such offence such person shall forfeit the sum of five dollars, to be recovered before a justice of the peace of the county, in the name of the trustee by the supervisor of the district; and in case of such obstruction, for every day the same continued, such sum shall be recovered; and in all such cases such supervisor, within three days after receiving information of any such forfeiture, shall commence such suit, and the sum recovered thereon shall be paid to the trustee of the township for the benefit of the highways of such district: provided, that in such actions the justice of the peace shall tax as costs, in all such cases where judgments are rendered, the sum of five dollars as attorney's fees for plaintiff's attorney." It is manifest, we think, from the averments of the complaint herein, the substance of which we have heretofore given almost in the language of the pleader, that it was drawn upon the theory that appellee was liable to the penalty or forfeiture prescribed in the section quoted of the above-entitled act of March 2, 1883, not for its obstruction of the highway, but for the non-performance of its statutory duty to restore such highway to its former state, or in a sufficient manner not to unnecessarily impede its usefulness. We are of opinion that this theory is radically wrong and cannot be sustained. Appellee had the right, under the law of its incorporation, to obstruct the highway by building, constructing, and maintaining its railroad track on, over, and across the same, and to operate its trains of cars thereon, as charged in the complaint herein. It was appellee's duty, under its charter, to restore such highway to its former state, or in a sufficient manner not to impede its usefulness. The complaint avers, and the demurrer admits, that appellee failed to perform its statutory duty in the premises; but neither the general laws for the incorporation of railway companies nor the aforesaid act of March 2, 1883, have prescribed any penalty or forfeiture for such a failure to perform such duty. Our conclusion is that the court below committed no error in sustaining the demurrer to the complaint herein. The judgment is affirmed, without costs.

Penalty for obstructing crossing.

No penalty for failure to restore crossing.

Highway—Railroad Crossing—Restoration.—In *Town of Roxbury v. Central Vt. R. Co.* (Vt.), 14 Atl. Rep. 92, the defendant was given the right,

under its charter, to cross highways, provided it should restore such highways to their former state and usefulness as far as practicable, to the acceptance of the selectmen of the town, or of commissioners provided for in the charter. In an action by a town for damages recovered against it by a traveller injured on the approach by reason of the want of a railing to an embankment made by the defendant in constructing the crossing, the jury found specially that there had been no acceptance of the crossing in question by either tribunal mentioned in the charter, and that all repairs that had been made on the approach since the railroad had been built, in 1849, had been made by the town. *Held*, that defendant was liable under its charter, and that this was a continuing liability, and was not barred by limitation; that the fact that the town had repaired the travelled track of the approach slightly would not warrant the presumption that the town had accepted the crossing, against the finding of the jury to the contrary; that the word "crossing," as applied to the intersections of a highway and railroad, means the entire structure, including the approaches, although a part of the structure be outside of the surveyed limits of the railroad.

The court say that "The word 'crossing,' as applied to the intersection of a common highway and a railroad, and as used in the statutes, means the entire structure, including the approaches, although a part of the structure may be outside the lines of the railroad's lands, or the place where the roads actually cross each other. Such is the holding as to bridges, whether over streams or roads. *White v. Quincy*, 97 Mass. 430; *Pierce*, R. R. 250, and cases there cited. And see *Railway Co. v. Dale*, 8 El. & Bl. 836; *Freeholders v. Strader*, 18 N. J. Law, 108; *Penn Tp. v. Perry Co.*, 78 Pa. St. 457; *Daniels v. Intendant*, etc., 55 Ga. 609; *People v. Railroad Co.*, 74 N. Y. 302; *Hayes v. Railroad Co.*, 9 Hun, 63; *Parker v. Railroad*, 3 Cush. 107; *Com. v. Inhabitants of Deerfield*, 6 Allen, 449; *Titcomb v. Railroad Co.*, 12 Allen, 254; *White v. Inhabitants of Quincy*, 97 Mass. 430. Such was also the ruling, as to a crossing like this, in *Farley v. Railroad Co.*, 42 Iowa, 234. We therefore hold that it was the company's duty, under the charter, to so construct the highway at the crossing that the same should be, as nearly as practicable, as available for the safe use of the travelling public as the highway was before; and, if the elevation was such that the approaches on the highway must extend beyond the surveyed limits of the railroad in order that the crossing might be thus available, then the charter contemplated the building of the approaches to meet the necessity; and, if a railing along the sides of the embankment constituting the approaches was required to thus restore said highway, the building of such railing was the duty of the company. The company, not having performed the condition of the charter in respect to restoring this highway to its former state and usefulness, cannot claim immunity under it. The obligation to restore was constant until performed. The negligence in the primary duty was continuing. The liability is like that in the ordinary case where a person puts an obstruction in the highway creating a defect, and causing special damage to a traveller. Such person must reimburse the town for a judgment recovered against it for injury resulting from such defect. The railroad company cannot protect itself against such liability on the ground that the statute of limitations would bar an action for the original obstruction. *Hamden v. New Haven Co.*, 27 Conn. 158; *Burritt v. City of New Haven*, 42 Conn. 174."

SOUTH AND NORTH ALABAMA R. CO.

v.

DONOVAN.

(Alabama Supreme Court, April 30, 1888.)

Railroads in Street—Walking Along Track—Injury—Negligence of Company.—It is the duty of the employees of a railroad company running a train through the business portion of a populous city, where necessity may often compel or common usage gives color of sanction to walking upon its tracks at a point where there is no public crossing, to keep a vigilant lookout even for trespassers, and a failure to do so is negligence.

Same—Recovery by Infant—Effect on Action by Parent.—Prior to the act of January 23, 1885 (Ala. Code, sec. 2588), a recovery by an infant for injuries caused by negligence in a suit brought in his name by his next friend was no defence to an action by the father for his own benefit for the same injury.

Same—Rate of Speed Greater than Allowed by Ordinance—Negligence per se.—The running of a railroad train operated by steam power through the corporate limits of a city at a greater rate of speed than that prescribed by a city ordinance which is not shown to be unreasonable, is negligence *per se*.

Same—Injury to Child—Suit by Parent—Instruction.—In an action by a father, for an injury to his minor child caused by the negligence of a railroad company, in which the evidence for the plaintiff tends to show that when the child went upon the track he looked both ways and saw no trains approaching, an instruction which withdraws from the consideration of the jury all inquiry as to whether the employees of the company could, by the exercise of reasonable care and prudence, have averted the injury, and pronounces the conduct of the plaintiff in allowing his son to go upon the track negligence *per se* in any view of the evidence, and without regard to any inquiry as to the remoteness or imminency of the danger, is properly refused.

Same—Contributory Negligence of Parent—When Prevents Recovery.—The contributory negligence of a parent in allowing his infant child to go upon a railroad track, which will prevent him from recovering against the company for injuries to such child, must be proximate, and not remote.

APPEAL from Jefferson County Circuit Court.

Action against the South & North Alabama R. Co. by James Donovan, father of Wm. Donovan, for personal injuries to the latter by being run over by a train of cars in the corporate limits of the city of Birmingham. The child was under ten years of age, was in the habit of crossing the track, at the place where he received the injury, on his way to and from his father, to whom he carried his dinner; at the time of being struck by the train he was on the track, looking in the opposite direction from

the train, which was being pushed backwards by a locomotive in the rear of the cars, at a greater rate of speed than four miles per hour, which was the highest rate of speed allowed by the ordinance of the city of Birmingham. The injury occurred at a place other than a public crossing, at which, as well as elsewhere, the evidence showed that persons were in the habit of walking on and about the track. The evidence as to giving of signals by the approaching train, which was also required by the city ordinance, was conflicting, as well as the evidence as to how long the boy had been standing on the track when struck. The testimony for the defendant was that the boy was walking along by the side of the track, and stepped thereon when the train was only about thirty feet behind him.

The act of Alabama of January 23, 1885 (Code 1886, sec. 2588), provides that a suit by the representatives of a minor for a personal injury is barred by a suit by the father or mother for the same injury.

Appeal was taken by the defendant from the ruling and judgment in favor of plaintiff.

Hewitt, Walker & Porter, and *Jones & Falkner* for appellant.
James Weatherly for appellee.

SOMERVILLE, J.—The plea of the defendant numbered 1 was defective, in failing to aver that the employees in charge of the train used proper diligence in keeping a lookout for obstructions on the track, including, in this case, the plaintiff's son, for whose injury the father brings the present action. The plea avers that the infant son was trespassing upon the track at a point where there was no public crossing, to which the defendant company had the exclusive right, and that so soon as its employees discovered the boy all available preventive measures were adopted to avert the injury. This plea admits the averments of the complaint that the alleged trespass occurred within the corporate limits of the city of Birmingham, and that the train was running at a rate of speed in excess of that prohibited by an ordinance of the city. It rests, therefore, upon the idea that there is no duty devolving on a railroad company, under these circumstances, to keep any lookout for trespassers who walk upon or across its track at any other place than public crossings, even within the corporate limits of a city,—it may be a populous city,—and within the business portion of it, where necessity may often compel this kind of trespassing, or common usage give color of sanction to it under the form of an implied license. Railroad companies, operated by steam-power, are required to use very great care; and this care must be graduated to suit the exigency of increased danger whether to employees, passengers,

Failure to aver
in plea that
employees used
diligence.

or the public. We cannot say that it was not the duty of the persons who were managing the train, under the circumstances, to keep a vigilant outlook even for trespassers, and that a failure to do so would not be negligence. The decisions of this court support the contrary conclusion, at least where the injury occurs in the streets of a city, town, or village. What the rule would be where a naked trespasser on the track is injured in the open country, or elsewhere, by the failure of the railroad engineer to keep a vigilant lookout, is an open question in this state, upon which we now express no opinion. Code 1886, § 1144; Railroad Co. *v.* Shearer, 58 Ala. 672, 678; Railroad Co. *v.* Sullivan, 59 Ala. 272; Frazer *v.* Railroad Co., 81 Ala. 185; s. c., 28 Am. & Eng. R. R. Cas. 565; Freer *v.* Cameron, 55 Am. Dec. 674, note. The demurrer to this plea was sufficient to raise the point, and it was properly sustained. And, for like reason, the first charge given by the court at the request of the plaintiff was free from error.

2. When the present action was commenced, in January, 1884, prior to the act of January 23, 1885 (Code 1886, § 2588), two separate and distinct suits would lie for the injury alleged in the complaint: the one for the benefit of the infant himself, which could be brought by his next friend, and the other for the benefit of the father, based on the loss of the infant's services, and such other special damages as may have resulted from the injury inflicted. Pratt Coal & Iron Co. *v.* Brawley, 83 Ala. 371; Georgia Pac. R. Co. *v.* Propst, 83 Ala. 518. The recovery of the infant, therefore, in the suit brought in his name by the plaintiff as his next friend, which is set up in the second plea as a bar to the action, was no defence to this action, brought by the father for the same injury, but for his own benefit. The court ruled correctly in sustaining the demurrer to this plea.

Recovery by
infant no de-
fence to action
by father.

3. The court correctly charged the jury that the running of a railroad train, operated by steam-power, and running through the corporate limits of a city, at a greater rate of speed than that prescribed by the city ordinance, which was in evidence, would be negligence *per se*. The precise question was decided in Gothard *v.* Railroad Co., 67 Ala. 115, and that decision is sustained by an overwhelming weight of authority; it being held generally that a failure to comply with any regulation imposed by a city ordinance, and not shown to be unreasonable, is *per se* culpable negligence on the part of a railroad company. The rule is as applicable to trespassers as to others, being in the nature of a police regulation favorable to the preservation of life and limb, and based on a duty to the public, who have a right to act upon the belief that such an ordinance will be observed by railroads

Speed—Viola-
tion of ordi-
nance.

generally. It cannot be said that railroad companies are under no obligations to take precautions to prevent injuries to intruders, especially when these precautions are required by law for the benefit of the public generally. *Meeks v. Railroad Co.*, 38 Amer. Rep. 67, 70; *Freer v. Cameron*, 55 Amer. Dec. 674, note; *Thomp. Neg.* 419, 1232; *Shear. & R. Neg.* §§ 484, 485; *Pennsylvania Co. v. Hensil*, 70 Ind. 569, 36 Amer. Rep. 191; *Correll v. Railroad Co.*, 38 Iowa, 120; 18 Amer. Rep. 22.

4. The first charge requested by the defendant was properly refused, for two reasons: (1) It withdrew from the consideration of the jury all inquiry as to whether or not the employees of the defendant, in the management of the train, could, by the exercise of reasonable care and prudence, have averted the injury, either by keeping a vigilant outlook, giving the proper signals required by law, or by conforming to the requirement of the city ordinance regulating the speed of the train. (2) It pronounced the conduct of the plaintiff, in allowing his son to go on the track, negligence *per se*, in any aspect of the evidence, and without regard to any inquiry as to the remoteness of the danger on the one hand, or its imminency on the other. To disentitle the plaintiff to recover, the negligence which on his part contributes to the injury must be proximate and not remote. *Meeks v. Railroad Co.*, 56 Cal. 513; 38 Amer. Rep. 67, 70; *Frazer v. Railroad Co.*, 81 Ala. 185; s. c., 28 Am. & Eng. R. R. Cas. 565. In the plaintiff's aspect of the case, this was a question properly for the consideration of the jury; the plaintiff's evidence tending to show that, when the boy went on the track, he observed no trains approaching after looking in both directions. The charge is not so broad as the averments of the fourth and fifth pleas, upon which the plaintiff took issue.

5. The second charge was liable to the same objections the first plea was, to which, as we have seen, a demurrer was properly sustained. These objections we need not repeat.

The third and fourth charges were properly refused, being faulty in the particulars above suggested as rendering the first charge erroneous.

The rulings of the court are, in our opinion, free from error, and the judgment is affirmed.

CLOPTON, J., not sitting.

Railways—Crossings—Duty of a Railroad Company to Trespassers on its Track at Crossings.—See *Virginia Midland R. Co. v. White* (Va.), 34 Am. & Eng. R. R. Cas. 22; *Guenther v. St. Louis, I. M. & S. R. Co.* (Mo.), 34 Am. & Eng. R. R. Cas. 47, and note 55-60.

Same—Use of Road-bed as Foot-path.—As to the duty of railway companies to persons who have acquired an easement by invitation or custom

to use a railway road-bed as a foot-path, see *Troy v. Cape Fear & Y. V. R. Co.* (N. C.), 34 Am. & Eng. R. R. Cas. 13, and note, 20-22.

Same—Acquiescence in Crossing.—As to the right of the public to cross a railway other than at a public crossing, and the corresponding duty of the company towards such persons, see *Troy v. Cape Fear & Y. V. R. Co.* (N. C.), 34 Am. & Eng. R. R. Cas. 13, and note, 20.

In *Byrne v. New York Cent. H. R. R. Co.*, 104 N. Y. 362, it is held that at a place on the line of a railroad where although not a public highway there is a crossing, constantly and notoriously used as such by the public without objection on the part of the company, the company is bound to give some reasonable notice and warning of the approach of trains. See *Barry v. New York Cent. & H. R. R. Co.*, 92 N. Y. 289; *Sutton v. New York Cent. & H. R. R. Co.*, 66 N. Y. 243; *Nicholson v. Erie R. Co.*, 41 N. Y. 525.

In *Nichols v. Washington O. & W. R. Co.*, 83 Va. 919, the shortest route from a village to its railway station was a path across a switch; the company's agents, with the knowledge of its officers, habitually separated the cars standing on this switch so as to leave a space between them near this path; plaintiff's intestate on his way to the station passed through such an opening when the space was only eighteen inches, and was caught and killed by the sudden backing of the train. When he reached the track he could not see the engine, and had no notice that the cars were about to start. The court held that the company was liable, because keeping this crossing open constituted an invitation to the public to use it in coming to the station. In *Louisville & N. R. Co. v. Schuster* (Ky.), 7 S. W. Rep. 874, it appeared that the plaintiff was run over when on the defendant's track, at a crossing in a large city,—such crossing, to the knowledge of the defendant, being generally used by the inhabitants of that city. It was also in evidence that those in charge of the train could have saved the plaintiff by the use of ordinary care, either by checking the train or by warning him of his danger by the whistle. The court say, that in such a case it is a well settled rule in Kentucky that the injured party can recover. Citing, *Louisville & N. R. Co. v. Yandell*, 17 B. Mon. (Ky.) 586, and *Louisville & N. R. Co. v. McCoy*, 81 Ky. 404.

DENVER AND SANTA FE R. CO. *et al.* v. DOMKE *et al.*

DOMKE *et al.* v. DENVER AND SANTA FE R. CO. *et al.*

(Colorado Supreme Court, April 19, 1888.)

Railroads in Street—Municipal Ordinance—Validity.—A city ordinance granting the right of way to a railroad company through designated streets, is valid under Colo. Const. art. 15, sec. 4, providing that any railroad company may construct a railroad between any designated points in the state, and under the charter of the city of Denver of 1877, sec. 40, providing that the city council may regulate the location of railroad tracks, the use of locomotives, the construction of public crossings, and the speed of trains, such ordinance confers a valid license to the use of the designated streets.

Same—Change of Gauge—Injunction.—In the absence of any imputation of fraud on the part of a railroad company in procuring the passage

of a city ordinance under legislative authority, granting to the company a right of way for its track through certain designated streets, an injunction will not lie at the suit of an abutting owner to restrain the company from changing its tracks from a narrow to a standard gauge.

APPEAL from Denver Supreme Court.

In November, 1880, the Denver Circle R. Co. was organized as a corporation under and by virtue of the laws of the state of Colorado. In January, 1881, it procured the passage of an ordinance by the city council, granting authority to locate, construct, maintain, and operate a single or double track railway and telegraph line through certain streets of the city, including Willow lane and Clark street. It thereupon proceeded to construct a narrow gauge railway through the streets above named, among others, and during the same year completed and commenced operating the road through said streets. The business thus inaugurated has been carried on down to the present time. The Circle Co. becoming financially embarrassed in the operation of the road, judicial proceedings were instituted, and a receiver appointed, who took possession thereof. In the course of time a decree was entered by the circuit court of the United States, under which the road, its rolling stock, and all its rights and franchises were sold. In 1887 the Denver & Santa Fe R. Co. was organized under and in pursuance of the corporation laws of Colorado. The parties organizing this company had previously bought the capital stock, mortgage bonds, and evidences of indebtedness issued by the receiver of the Circle Co. The Denver and Santa Fe Co. upon its organization, became the owner of the property thus purchased. The latter company proceeded with the operation of the Circle road as constructed, and also prepared to put down a third rail upon the ties already laid, for the purpose of operating thereon standard gauge trains, and carrying on the business of a standard gauge road. The company connected directly, at Pueblo, with the Atchison, Topeka & Santa Fe Co., a through line from Kansas City to Pueblo. Plaintiffs, Herman Domke and others, are the owners of lots abutting on the two streets mentioned. They brought this suit in equity in the superior court for the purpose—first, of permanently enjoining the further operation of the narrow gauge Circle R. as now constructed; and secondly, for the purpose of perpetually enjoining the laying of the third rail, and the operating of standard gauge trains. The cause was tried to the court sitting as a chancellor. The first kind of relief thus sought was denied, but an injunction was granted under the second demand or prayer, staying the projected changes until the Denver & Santa Fe Co. had first proceeded, under the eminent domain statute, to condemn the right of way, in connection with the alleged additional

burden, and have the damages to result to the plaintiffs' abutting property assessed. From the portion of the decree denying the injunction to restrain the continued operation of the Circle road, as now constructed, plaintiffs below appealed to this court. From the portion of the decree allowing the injunction restraining the laying of the third rail, etc., defendants below took their appeal. By agreement the two appeals are consolidated, and the errors assigned by both parties are considered and disposed of in one decision. The remaining essential facts, together with the constitutional and statutory provisions involved, sufficiently appear in the opinion.

Patterson & Thomas for plaintiffs.

C. E. Gast and Edw. L. Johnson for defendants.

HELM, J.—The constitution (article 15, § 4) declares, *inter alia*, that "any association or corporation organized for the purpose shall have a right to construct and operate a railroad between any designated points within the state." Constitutional and statutory provisions.

It may happen that one of the "designated points" is within the corporate limits of some city or town, and can only be reached through a street. The legislature, by the act in force when the Circle Co. ordinance was passed, authorized the city council of Denver "to regulate and prohibit the use of locomotive engines, to direct and control the location of railroad tracks, to require railroad companies to construct, at their own expense, such bridges, tunnels, or other conveniences at public crossings as the city council may deem necessary, and to regulate the speed of all railroad trains." Charter 1877, § 40, subd. 45. See also charter 1874. This statute clearly contemplates the use of streets by ordinary railroads. Unless such use was in the legislative mind, its provisions are meaningless. Other provisions of the same act show conclusively that the clause in question does not refer to local street railways. But it is held that the fee to streets in Denver, covered by statutory dedications, is vested in the city in trust for the use of the public. *Railroad Co. v. Nestor*, 10 Colo. 403; *City v. Clements*, 3 Colo. 472. The legislature has delegated the exclusive control of the streets to the municipal authorities, subject only to its own paramount dominion. We think the authority of the city council to permit the construction and operation of an ordinary railroad through the street rests upon clearly implied, if not express, legislative sanction. This question is practically *res adjudicata*. Exclusive control of streets vested in city.

"It was within the contemplation of the legislature that they [ordinary railroads] might enter and pass through the city." *Railroad Co. v. Nestor*, *supra*; *Railroad Co. v. Mollandin*, 4 Colo. 154. It is hardly necessary to say that we regard the sev-

eral additions referred to in this case as having been platted and recorded substantially in compliance with the statutory requirements, and hence treat them as statutory dedications. The statute does not, however, make this a usual or ordinary use. It recognizes the importance of allowing such railroads ingress and egress into and out of the city, and the necessity of laying their tracks and operating their lines along some of the streets; but the use remains an unusual and extraordinary use. It is not one of the uses to which every street is necessarily and primarily dedicated. The authority of the council to permit this use is correctly termed a "special power." This power will naturally be exercised in connection with but few of the streets; and, while all dedications or grants are subject to the exercise of the power, as a matter of fact it is very rarely contemplated in the act of dedication. There is, therefore, no difficulty in distinguishing between the abutting owner's right to compensation for injuries occasioned by the use, and his claim where the injury complained of results from a reasonable and careful grading or other improvement of the street for local convenience and travel. Upon this subject, see the following opinions, and cases there cited: *Railroad Co. v. Nestor*, *supra*; *City v. Verina*, 8 Colo. 399; *City v. Bayer*, 7 Colo. 113. The ordinance before us, granting a right of way to the Circle road, is therefore not invalid for the want of legislative authority in the premises. So far as this objection is concerned, the ordinance constitutes a valid license from the proper authorities to use a portion of the streets designated, and the Circle Co. was not a mere trespasser *ab initio*.

The superior court did not err in refusing to enjoin the operating of the Circle road. It is sufficient, upon this objection, to say, first, that some of the plaintiffs below obtained their title after the company, acting under the municipal license above mentioned, had constructed its road, and the same was in operation; second, that the rest of the plaintiffs, all of whom were owners prior to the occupation of the street under such license, quietly stood by, permitting the expenditure of a large sum of money in construction, and waited more than six years after such construction before entering a protest by instituting these legal proceedings; and that neither class of plaintiffs, thus situated, is in position to ask of a chancellor injunctive relief against the operation of the road as now constructed. If, by this use of the street, the market value of plaintiffs' abutting property, for any use to which it may reasonably be put, has, since they became the owners thereof, been diminished, and by laches or otherwise they have not forfeited their right to compensation, they may bring an action at law and recover. But, under the circumstances here presented, a

Not error in
refusing in-
junction.

court of equity will not, through the extraordinary writ invoked, lay its strong hand upon the company, and stay the carrying on of its lawful business.

Did the court below err in enjoining the Denver & Santa Fe Co. from laying a third rail, and operating standard gauge trains upon the road-bed originally constructed by the Circle Co., until it had proceeded under the eminent domain statute, to condemn a right of way through the two streets mentioned in the pleadings?

Laying third rail—Change of gauge—Injunction.

This is not an action directly against defendants for the unlawful usurpation or exercise of a corporate franchise, nor for the illegal appropriation or use of a public or *quasi* public license. Neither the public, nor the city of Denver, nor any one acting or professing to act in behalf of the public or city, is here complaining. The suit is instituted by private property owners along the two streets in question, in their private capacity, and to prevent by injunction the continuation of one alleged private injury, and the perpetration of another private injury alleged to be threatened. Turning to the ordinance granting the Circle Co. permission to use the streets named, we find that the company was "authorized to locate, construct, maintain, and operate a single or double track railway and telegraph line, with the necessary turn-outs and switches," also, that authority was given "to operate said railroad by steam-power;" further, that the privileges conferred were to "be used for the purpose herein set forth, and none other." Nothing is said in this ordinance about the width of the gauge, size of the cars, or character or amount of traffic to be carried on. It is only by going back of the ordinance, and examining the articles of incorporation of the Circle Co., that a controversy in these respects is introduced. Plaintiffs allege that the city council was deceived by the statements as to gauge in those articles, and by the verbal representations of those who originated the enterprise; that the council adopted the ordinance, with the understanding that the track would be of "three-foot or narrow gauge" width, and the trains would be operated only by the use of "dummy and noiseless engines." No such understanding is embodied in the ordinance. It describes an ordinary railway, with leave to use "steam-power" in operating its trains. The courts cannot, at the suit of a private party, the city remaining silent, and no fraud being imputed to the municipal authorities, in a collateral proceeding, ignore, annul, or reconstruct the ordinance on the ground of mistake or deception connected with its original adoption. For the purposes of this suit, we must accept the ordinance as it reads, and construe the privileges granted as broad enough to include a standard gauge track, with standard gauge rolling stock. It should, per-

haps, be observed, in passing, that while the Circle Co.'s articles of incorporation specify the gauge, the incorporation law, under which they were framed, contains no such requirement.

A clause in the ordinance provides that the Circle Co. "shall not grant to any other railroad company the right to use any part of said right of way." Whatever may have been the purpose of this provision, it is clear that there was no intention to prevent the passing into other hands of the company's property, including the license granted; for another clause declares "that said company, its successors and assigns, are authorized," etc. And it is equally clear that the Denver & Santa Fe Co., through the purchase at the receiver's sale, succeeded to the rights and interests of the Circle Co. under the ordinance. The former company is, therefore, the owner of the franchise, together with the license in question. It is also in possession of the property, and entitled to operate the road as now constructed.

We shall assume, without, however, determining the matter, that the laying of the third rail, and doing the business of a standard gauge trunk line, is an additional burden or servitude imposed upon the street; also, that those acts may result in injury to the abutting lot-owner, for which, under the constitution, he is entitled to compensation. Should a court of equity, at his suit, in view of the facts of this case, grant an injunction, forbidding the acts in question? As we have already seen, the fee to Willow lane and Clark street is by law vested in the city in trust for the use of the public. It is not, and never was, in the present plaintiffs, who are purchasers of lots subsequent to the dedication of the streets. There is no evidence to show that the grants to them included the reversionary interest or reserved rights, if any such interest or rights there be, of the dedicator in this fee. If the street should be abandoned by the municipality, or for any other reason the trust should fail, and the fee pass out of the city, it would not revert to plaintiffs. *Gebhardt v. Reeves*, 75 Ill. 301. It follows, therefore, that the increased burden mentioned would not constitute an actual taking of plaintiffs' property, though their peculiar interest in the street as abutting owners might entitle them to compensation for injuries inflicted. Besides, it is suggested that, where such a qualified fee in the city as we are now considering exists, "the reversionary right of the owner of the fee in the surface of the street is too remote and contingent to be of any appreciable value, or to be regarded as property, which, under the constitution, is required to be paid for when its use is appropriated by the public." *Spencer v. Railroad Co.*, 23 W. Va. 406; s. c., 20 Am. & Eng. R. R. Cas. 125, and cases cited. But where the fee of an individual is not sought to be taken, though an abutting lot-owner, he cannot en-

join the construction and operation of a railroad, merely because the damages to his premises are not compensated in advance; provided the company act under sufficient legislative and municipal authority. 1 High Inj. (2d Ed.) § 637.

It is contended that this doctrine ought not to be held applicable here, because of the peculiar phraseology of our constitution. True, this instrument declares that private property shall not be "damaged" without compensation. It does not, however, require that the damages, where property is not "taken," shall be computed and paid before the injuries complained of are inflicted. It provides that "property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested," till remuneration be made. The proprietary rights of plaintiffs in the land are not divested, because such rights do not exist. There may be a disturbance of the easements connected with the use or enjoyment of their abutting lots; but needful disturbances of property may take place without prior compensation. *McClain v. People*, 9 Colo. 190. The city council, by adopting the right-of-way ordinance, determined conclusively, so far as the general public is concerned, including all interests of the plaintiffs common to the general public, that the anticipated disturbances were needful. But the disturbances mentioned in the constitution are, in our judgment, disturbances of property sought to be taken, or, at least, property of the same owner out of which that desired is to be carved. We do not think that the clause in question was intended to require the prior assessment and payment of probable damages for disturbances, to take place in the future, of an easement connected with the property of a party, no part of which is taken, near or adjacent to the land condemned.

The authority for injunctive relief in cases like the one at bar must therefore be found, if it exist at all, in the eminent domain statute. Under a statute similar to ours in this respect, and with a constitutional provision in force substantially the same as ours, with the exception of the clause last above construed, the supreme court of Illinois denied this relief to abutting owners. It is held by that court that the corresponding statutory expression directing an assessment in condemnation proceedings, or compensation for damages to property not taken, must be construed as referring "to contiguous lands of the same owner not actually taken." *Stetson v. Railroad Co.*, 75 Ill. 74; *Patterson v. Railroad Co.*, Id. 588; *Railroad Co. v. Schertz*, 84 Ill. 136. The reasoning of these opinions on this point is satisfactory. We shall not repeat it, nor attempt to enlarge upon it or add to its force. The dissenting views in the *Schertz* case are based upon a peculiar expres-

Authorities—
Illinois cases.

sion of the ordinance there under consideration, and the insolvency of the defendant company, neither of which matters appears in the case at bar. No inconsistency exists in this respect, as counsel for appellees seem to think, between those cases and the later case of *Rigney v. City*, 102 Ill. 64. The *Rigney* case was an action at law by the abutting owner for injuries that had already been inflicted. And the *Stetson*, *Patterson*, and *Schertz* cases, while denying injunctive relief, recognize the right of recovery invoked and allowed in the *Rigney* case. We mention the fact that there is no averment or proof, in the case before us, that the Denver & Santa Fe Co. are insolvent, or unable to respond in damages in actions at law for all actionable injuries that may be inflicted, though the existence of such insolvency is not deemed sufficient by a majority of the supreme court of Illinois to warrant interference by injunction prior to the assessment of damages in a legal action. If a judgment at law has been obtained, and for any reason, not the fault of plaintiff, it cannot be collected, he may appeal to equity for appropriate relief. *Railroad Co. v. Schertz*, *supra*. See, further, upon this branch of the discussion, the following cases: *Spencer v. Railroad Co.*, *supra*; *Railroad Co. v. Reinhackle*, 15 Neb. 279; s. c., 14 Am. & Eng. R. R. Cas., 169; *Protzman v. Railroad Co.*, 9 Ind. 467. In England, statutes exist containing provisions substantially similar to those we are now considering, constitutional as well as statutory; and the courts of that country adhere, in effect, to the foregoing rule, denying injunctive relief in cases like the one before us. *Hutton v. Railway Co.*, 7 Hare, 259; *Lister v. Lobleby*, 7 Adol. & E. (N. S.) 124.

Our statute (section 242, Civil Code) seems to contemplate that the commissioners or jury shall determine the necessity for the taking of private property, though they are not required to return a specific finding upon this question. The ordinance granted the Circle Co. the privilege of constructing and operating a standard gauge railway; and we must, in the present suit, presume that it was adopted by the city council after full and careful investigation of the subject. Since the fee is not in plaintiffs, and the council possessed authority to grant the privilege in question, their action must be considered decisive as to the necessity for the taking, in so far as the license to use a street for this purpose can be considered a "taking" of private property. Besides, this provision of the statute does not refer to the damaging of property. If, therefore, there be no taking of the land, the consequential injuries resulting to an abutting lot-owner, through interference with certain easements, do not entitle him, by virtue of the statute, to interpose the objection that the use of the street is not necessary.

Abutting owner not entitled to interpose objection.

The decree of the superior court will be reversed, and the cause remanded.

Railways in Street—Change of Gauge.—As to change of gauge of a street railway track by a city, see *ante*, *Des Moines Street R. Co. v. Des Moines Broad-gauge R. Co.*, 132, and note, 135.

OTTAWA, OSAGE CITY AND COUNCIL GROVE R. CO.

v.

LARSON.

(*Kansas Supreme Court, November 10, 1888.*)

Railroad in Streets—Change of Surface—Obstructions—Damages.—A railroad company may, under the provisions of the statute and under the authority of the city ordinance, construct and operate its railroad in a public street in a legal and proper manner, making such alterations in the surface of the street necessary to the construction and operation of its road, and which do not necessarily impair the usefulness of the street, without being liable to abutting lot-owners or others for damages; but such a company cannot, any more than an individual, wrongfully and unnecessarily block up nor obstruct a street without being liable therefor.

Eminent Domain—Compensation—Consequential Damages—Constitutionality of Law.—Subdivision 4, § 47, c. 28, Comp. Laws 1885, is not in contravention to section 4, art. 12, of the constitution of the state, or of the fifth amendment of the constitution of the United States; as the constitutional right to compensation for private property taken for public use does not extend to instances where the land is not actually taken, but indirectly or consequentially injured.

Dedication—Reservation—Use of Street for Railroad—Duty of Company.—Where a corporation, owning land adjoining to a city, lays out and plats its land as an addition to the city, and dedicates the streets for public use, with the condition that it reserves to itself, its successors or assigns, the right to use and occupy the streets for the purpose of operating a railroad, such reservation does not relieve the corporation from constructing, operating, and maintaining its line of railroad in a legal and proper manner.

ERROR to District Court, Osage County.

On the 28th day of May, 1886, Andrew Larson filed his petition against the Ottawa, Osage City & Council Grove R. Co., in the district court of Osage county. The petition alleged: "That he is the owner of lots Nos. 6, 7, 8, and 9, in block thirty-one (31), and lots Nos. 4 and 5, in block thirty-eight (38), all in Osage Carbon Company's second addition to Osage City, in Osage county, state of Kansas. That said second addition is duly platted of record, and the streets and alleys thereof, including F street, are duly and lawfully dedicated and opened to the public as such streets and alleys; and that the portion of said second

addition embracing plaintiff's said lots is within the corporate limits of said Osage City. That plaintiff selected, purchased, and improved and occupied and cultivated, and now occupies and cultivates, said lands, with reference to and for the purpose of his comfort, convenience, and profit, and the comfort and convenience of his family, and as his and his family's homestead. That, in furtherance and pursuance of said purposes, he has improved said lands with fences, family residence, barns, and other necessary buildings, with fruit, ornamental, and other trees, shrubs, and plants,—all at an aggregate expense to him of eight hundred dollars. And plaintiff says: That the defendant is a railroad corporation, duly organized under the laws of the state of Kansas, owning, constructing, occupying, and operating a standard gauge railroad, known and styled the 'Ottawa, Osage City & Council Grove R.' That said railroad is by defendant located, constructed, and operated on and along the whole of F street, in said second addition to Osage City, length and breadth, and on and along the south line and front of said lots Nos. 6, 7, 8, and 9, in said block 31, and on and along the north line and front of said lots 4 and 5, in block 38, of said second addition. That in constructing, locating, and operating said railroad on and along said street, and upon and along said lines and fronts of said lands of plaintiff, defendant has dug and excavated large and deep ditches along and upon said street, and along and upon the said lines and fronts of plaintiff's said lands, and raised and builded a great elevation along and upon said street, and along and upon the said lines and fronts of said lands of plaintiff; and has laid, fixed, and fastened along and upon the top of said elevation, for the whole length thereof, the ties and track of said railroad. That thereby defendant has wholly occupied and destroyed said F street, length and breadth, and particularly on and along said lines and fronts of plaintiff's said lands as such streets and highways; and that said defendant has not repaired, amended, or restored said street, or any part thereof, or sought, undertaken, or attempted to repair, amend, or restore said street, or any part thereof, to its original or to any condition, state, or degree of usefulness or availability as such street or public highway; and plaintiff further says that said street on and along said lines and fronts of his said lands is the only means of ingress or egress to his said lands, or appertaining in any way thereto. And he further says that the location, construction, and operation of said railroad by said defendant, as hereinbefore complained of, has destroyed, injured, and impaired his said fences, dwelling-house, barns, and other buildings and improvements on said lands, and rendered them useless, untenable, and unavailable; and has rendered said lands and premises unfit, undesirable, and untenable for the uses

and conveniences and comforts aforesaid; to his damage in the sum of one thousand dollars. Wherefore he prays judgment against said defendant for said sum of one thousand dollars, his damages so as aforesaid sustained."

On the 18th day of December, 1886, the following amended answer was filed by the railroad company: "Now comes the defendant, and for its amended answer to the plaintiff's petition denies each and every material allegation therein contained, except as hereinafter directly admitted. (2) For a second and further defence the defendant admits that it is a corporation, and is engaged in the operation of a railroad into and through the county of Osage, and over and upon F street, in the Osage Carbon Company's second addition to the city of Osage City, in said county; and the defendant says that the Osage Carbon Company is a corporation, duly created and existing under the laws of the state of Kansas, and as such corporation was on and prior to the 18th day of May, 1882, the owner of the lands on which said F street is now located. That on the 18th day of May, A.D. 1882, said, the Osage Carbon Company, caused said lands to be platted as its second addition to the city of Osage City, in said county; and by the terms of said platting it donated said F street, and other streets in said platted addition, for public uses, for streets, with the express understanding, and upon the express condition, that the right of the surface only should be contemplated as dedicated for the public use as streets; and that said, the Osage Carbon Company, its successors or assigns, or any person or company acting under its authority, should forever have the right to use or occupy said F street, or any of said streets in said second addition, for the purpose of operating any railroad, switches, or side tracks upon said F street, or any of the other of said streets in said addition. And this defendant further says that the said, the Osage Carbon Company, has assigned to said defendant the right to construct, operate, and maintain its line of railroad over and upon said F street, and has duly authorized the construction and operation of said railroad in a manner in which the same is constructed and operated by said defendant; and the defendant further says that the said plaintiff purchased the lots described in his said petition, subject to the rights so as aforesaid reserved by said, the Osage Carbon Company, and heretofore assigned to this defendant as aforesaid, to construct, operate, and maintain a line of railroad over and upon said F street. (3) For a third and further defence, the defendant admits that it is a corporation, and is engaged in the operation of a railroad into and through the county of Osage, and over and upon F street, in the city of Osage City, in Osage county, state of Kansas; and the defendant says that the said city ordinance, number 166, entitled 'An ordinance granting the

right of way to the Ottawa, Osage City & Council Grove R. Co., through the city of Osage City, Osage county, state of Kansas, which was passed and approved October 31, 1885, and which was duly published, and was at the times complained of in plaintiff's petition and is a valid ordinance of said city, granted to the said defendant a right of way to construct, operate, and maintain its railroad track, and such turnouts, switches, and side tracks as are essential and necessary to the transaction of the business of said company upon said F street, and the right to make drains along said F street, and to run cars, trains, and engines upon such right of way; and, under the authority conferred by said ordinance, this defendant has, in a proper and legal manner, constructed its track on said F street, in said city, and runs its cars, trains, and engines upon said street, and made necessary alterations of the surface of the street, and has not unnecessarily impaired the usefulness of said street for public travel and access to the abutting lots."

On the 18th day of December, 1886, the plaintiff filed the following demurrer: "Comes the plaintiff, and, for reasons appearing on the face thereof, demurs to the second and third defences in defendant's answer, set out for the reasons following, to wit: (1) That said second and third defences, and neither of them, state facts sufficient to constitute a defence to plaintiff's petition, or any cause of action therein stated. Wherefore plaintiff repeats the prayer of his petition." Upon the hearing of the demurrer, the court sustained the same as to the second and third defences contained in the railroad company's answer. To the ruling of the court in sustaining the demurrer the company excepted, and brings the case here.

Geo. R. Peck, A. A. Hurd, and C. N. Sterry for plaintiff in error.

McConnell & Hay for defendant in error.

HORTON, C. J.—This was an action commenced by Andrew Larson against the Ottawa, Osage City & Council Grove R. Co. to recover \$1000 damages on account of the location, construction, and operation of its road upon a public street in an addition to Osage City, in front of lots owned and occupied by him. In its answer, for a third defence, the railroad company admitted that it was a corporation, engaged in the operation of a railroad through Osage county, and over and upon F street in the city of Osage City; but alleged that the city, by ordinance No. 166, entitled "An ordinance granting the right of way to the Ottawa, Osage City & Council Grove R. Co., through the city of Osage" (which was duly approved and published), granted to the company the right to construct, operate, and maintain its railroad and track, and such turnouts,

Facts.

switches, and side tracks as were essential and necessary to the transaction of the business of the company upon F street, and the right to maintain drains along F street, and run cars, engines, and trains upon its right of way; that, under the authority conferred by the ordinance, the company had in the proper and legal manner constructed its track on F street, in the city, and run its cars, trains, and engines upon said street, and made the necessary alterations of the surface of said street, but had not necessarily impaired the usefulness of the street for public travel and access to abutting lots; that the city of Osage City was an incorporated city of the state, and that the lots set forth in block 40 of the Osage Carbon Co.'s second addition to the city of Osage City, and F street, which abutted said lots, and on which defendant's railroad was constructed, were within the corporate limits of said city. The district court sustained a demurrer to this part of the answer, upon the ground that it did not state facts sufficient to constitute any defence to the petition of Larson.

Subdivision 4, § 47, c. 23, Comp. Laws 1885, reads: "Every railway corporation shall, in addition to the powers hereinbefore conferred, have power . . . to construct its road across, along, or upon any stream of water, water-course, street, highway, plank-road, or turnpike which the route of its road shall intersect or touch; but the company shall restore the stream, water-course, street, highway, plank-road, or turnpike thus intersected or touched, to its former state, or to such state as to have not necessarily impaired its usefulness. Nothing herein contained shall be construed to authorize the construction of any railway not already located in, upon, or across any street in any city incorporate, or town, without the assent of the corporate authorities of such city." See also section 65, c. 19, Comp. Laws 1885, giving cities of the second class the power to provide for the passage of railroads over or upon streets and public grounds. In *Railroad Co. v. Garside*, 10 Kan. 552, it was decided that "a railway company having authority from the city may construct and operate its road over streets and public grounds without compensation to the abutting lot-owners for the use of the same, and without being liable to such lot-owners for consequential damages arising from noise, smoke, offensive vapors, sparks, fires, shaking of the ground, and other inconveniences and annoyances, where the railroad is operated in a legal and proper manner, and in fact it may so construct and operate its road without being liable to said lot-owner for any damage, where the road is constructed and operated in a legal and proper manner." It was decided in *Methodist Episcopal Church v. City of Wyandotte*, 31 Kan. 721, that,

Statutory provisions.

Authorized construction of road in street—Averments in answer.

in the absence of a statute creating a liability, "an action will not lie against a city for damages for the injury to adjoining property caused by a change having been lawfully made by the city authorities in the grade of a public street." 2 Dill. Mun. Corp. § 990; *Hedrick v. City of Olathe*, 30 Kan. 348. In *Heller v. Railroad Co.*, 28 Kan. 625, it was said: "The legislature, as the representative of the public, has plenary power over streets and highways, and, as a general rule, full discretion as to opening, improving, and vacating the same." A railroad laid out over or on a public street or highway, so as to obstruct it, without express statutory authority or necessary implication, is a nuisance; and the company laying and operating such a road is liable, by indictment or otherwise, for creating and maintaining a nuisance. Hence the answer properly alleged the express authority of the railroad company to construct, operate, and maintain its road upon the street described in the petition; and also that the road was "constructed and operated in a legal and proper manner," so as not to unnecessarily impair the usefulness of the street for public travel and access to abutting lots. If all the facts stated in the third defence are true, then the plaintiff is not entitled to recover, as the facts alleged are a full and sufficient answer to the petition.

Counsel for Larson contend, however, that said subdivision 4, § 47, c. 23, is in contravention of section 4, art. 12, of the constitution of the state; and also of the fifth amendment of the constitution of the United States; and therefore that the statute is void. Such is not the case. The constitutional right to compensation for private property taken for public use does not extend to instances where the land is not actually taken, but only indirectly or consequentially injured; and an act or ordinance authorizing the construction of a railroad, or other work of public nature, upon a public street or highway, the fee of which is in the public, is not unconstitutional because it does not provide for compensation for injuries to abutting lot or land owners. *Radcliff v. Mayor*, 4 N. Y. 195; *Railroad Co. v. Applegate*, 8 Dana, 289; *Transportation Co. v. Chicago*, 99 U. S. 635; *Railroad Co. v. Joliet*, 79 Ill. 35; *Conklin v. Railway Co.*, 102 N. Y. 107. See also *Hedrick v. City of Olathe*, *supra*. Counsel for Larson claim, however, that under the *Garside Case*, *supra*, the *Twine Case*, 23 Kan. 585, and the *Andrews Case*, 26 Kan. 702, and 30 Kan. 590, 2 Pac. Rep. 677, the plaintiff is entitled to recover *pro tanto*, for any impairment or partial destruction of ingress or egress to his lots. In the *Garside Case* it is said: "Therefore, in a case like the one at bar, where the railroad company has the legal right to construct and operate its road over certain grounds, we do not think that

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the company can by so doing be held liable for any damages of any kind, where it constructs and operates its road in a legal and proper manner. It can be held liable only where it constructs and operates its road in an illegal, improper, or wrongful manner. The plaintiff may, we think, recover for the third kind of damages. But, before he can do so, he must show, among other things, that the levee is a street or highway, as he has alleged; that the railroad company wrongfully and unnecessarily blocked up and obstructed the said street or highway; and that the plaintiff received actual injury from such obstruction. And the injury must be special as to him, and not such as affects the public in general. Of course, the railroad company can have no legal right to permanently block up the street; and it can have no legal right to temporarily block up or obstruct a street, except where it necessarily does so in the lawful and proper use of its road. It can pass and repass with its engines and cars the same as individuals may with their vehicles, and for such passing and repassing it cannot, of course, be liable to any one; but it has no more right to obstruct the street than an individual has, and it may make itself liable for obstructing a street the same as an individual may." In the Twine Case, the damages were allowed for completely obstructing access to an adjoining lot. In the Andrews Case, damages were allowed upon the ground that the lot-owner considered the complete obstruction by the railroad company as a permanent taking and appropriation of the alley. In all of these cases, it was asserted that a railroad company had no legal right to block up or wholly obstruct a street. These decisions, however, are to the effect only that a railroad company has no more right to obstruct the street than an individual has, and it may make itself liable for wrongfully and unnecessarily obstructing a street the same as an individual. To illustrate: An individual may drive his carriage or other vehicle up and down a street; but if he wrongfully and unnecessarily blocks up the street with his carriage or vehicle, so that it cannot be used for other vehicles, or for persons passing and repassing, he will be liable to any one damaged thereby. This court has held the same way in regard to the passing and repassing of engines and cars upon a street, where the railroad company has a legal right to construct and operate its road. It has, however, gone no further. The *pro tanto* theory has never been adopted. Indirect and general injuries give the lot-owner in this case no actionable damages. *Heller v. Railroad Co.*, *supra*. Counsel refer to the decisions of several courts, which, to some extent, support the court below in sustaining the demurrer. These decisions, as in Ohio, are contrary to the law elsewhere declared; and in the other states

Right to recover for destruction of ingress or egress to lots.

are upon statutes or constitutional provisions widely differing from ours. In passing, we may add that the legislature, in 1881, enacted a statute for property owners to recover damages, where the grade of a street has been charged to their injury. Section 18, c. 18, Comp. Laws 1885. This statute does not apply in any way to this case.

As to the second defence alleged in the answer, we do not think it important or material. The reservation to the Osage Carbon Company, its successors and assigns, to use and occupy the street for the purpose of operating a railroad, merely reserved to that company, if it reserved anything, the right to construct, operate, and maintain its line of railroad over and upon the street in a proper and legal manner. All of this is alleged to have been done in the third defence of the answer; and therefore the court below committed no error in sustaining the demurrer to the second defence. *Wood v. Water-Works Co.*, 33 Kan. 590. The ruling and judgment of the district court sustaining the demurrer to the third defence will be overruled, and the cause remanded for further proceedings in accordance with the views herein expressed. All the justices concurring.

Railway—Construction of Road—Raising Grade of Street—Injury to Lot-owner.—In *Louisville & N. R. Co. v. Finley* (Ky.), 5 S. W. Rep. 753, the defendant built its railroad on the public road directly adjacent to plaintiff's residence lot, and between his lot and the road. The lot was situated in a corner, and defendant raised the grade of the other public road from 15 to 30 feet, to cross its road-bed at grade, having plaintiff's lot in the low corner between its road-bed and the public road as raised by defendant. *Held*, that although the building of the road was by legislative grant, yet, where it deprived an adjacent owner from enjoying his premises by preventing ingress or egress, or flooded the same with water, or rendered them unhealthy, the injury was direct and actionable.

The court say: "When the extraordinary privilege is given to certain persons, who have formed themselves into a corporation to construct a public work, like a railroad, it must be done without interfering with any right then belonging to or being exercised by any individual. The legislative grant must be so construed; and if not so done, and a direct injury results therefrom to the property of the citizen, the corporation must answer in damages. Private rights must be regarded; the privilege is not an unlimited and arbitrary one; and it must be exercised with due regard, and without invading any personal right of enjoyment. No license is given by the grant to encroach upon private right, or to deprive the owner of it, either directly or indirectly. The authority is given subject to the preservation of it, and with the burden of responding in damages for its invasion and direct injury. Individual security and natural justice require this rule. We do not mean to determine that the abutting owner may recover for remote or consequential damages, resulting from a change in or the use of the road for the public good. If the work is being done by a corporation by legislative grant, and it keeps entirely within the public way, doing no injury except remotely, then there is no redress; but if it deprives the adjoining owner of his right to enjoy his premises by

preventing ingress or egress, or floods them with water, or covers them with dirt, or renders them unhealthy by the creation of stagnant pools of water, then the injury is *direct* and actionable. *Railroad Co. v. Hodge*, 6 Bush, 141."

As to consequential damages, see *ante*, *Adams v. Chicago, B. & N. R. Co.*, 7, and note, 16-20.

Same—Failure to Repair—Injury to Workman.—In *Kelly v. Manayunk & R. Incline Plane R. Co.* (Pa.), 12 Atl. Rep. 598, the grade of a city street was changed by the city authorities. The road-bed of the street was raised. A railway's track bounded the street on one side. The company raised its tracks by putting them on sleepers or ties of the new elevation. Before the spaces between these ties had been filled in, a workman engaged in rolling the road-bed of the street, slipped on the street, and fell into one of the spaces between these ties. The roller tilted from the street, was caught between the sleepers, and the workman was injured in consequence of the roller falling upon him. When the workman fell he was walking backwards, down hill, keeping to the right of the road. In an action for damages brought by the workman against the railway company, *held*, (1) that it was not error for the court to instruct the jury that they should consider whether this depression between the tracks was the cause of the accident, or whether or not it really did protect the plaintiff from receiving greater injury in having the roller go over him; (2) that the accident was caused by the negligence of the plaintiff himself, and the defendant company could not, under the evidence, be held responsible therefor.

Same—Reduction of Vertical Space of Bridge.—In *Gray v. Borough of Danbury*, 54 Conn. 574, it is said, that in the absence of statute a railroad company is not negligent in failing to maintain the height of one of its bridges above a highway as it was when the bridge was built, where the vertical distance between the road bed and the bridge has been diminished by raising the street.

PORT OF MOBILE

v.

LOUISVILLE AND NASHVILLE R. CO.

(*Alabama Supreme Court, May 3, 1888.*)

Railroad in Street—Franchise—Grant from City.—Where a railroad company is authorized by its charter to build its track through any street or highway, a grant to it by a city ordinance of the right of way through certain streets is the grant of a franchise, notwithstanding the privileges are not conferred directly by legislative enactment, since the municipality will be regarded as a political agent for the state.

Same—Side-tracks—Privileges.—Where, in addition to such privilege, the company is authorized to lay necessary sidings and turn-outs in such manner as it may deem expedient and necessary for its business and necessities, and the company laid its track and for many years without hinderance or opposition by the municipal authorities, loaded and unloaded its cars at the adjacent streets and warehouses, it cannot be deprived by

the city of the right so to load and unload in future, as this right will be construed as included by necessary implication in the grant of the privilege of laying sidings, etc.

Same—Right to Load and Unload Cars in Street—Franchise—Injunction.—Where a city has by ordinance granted to a railroad company the right to load and unload its cars in a street through which it passes, an injunction will be granted to protect such franchise and restrain an interference with such right under an ordinance attempting to discontinue its exercise.

Same—Jurisdiction—Personal Trespass.—It is no objection to the exercise of this jurisdiction that the attempted invasion of the franchise is accompanied by acts constituting personal trespasses.

Same—Character of Ordinance.—Nor is it a valid objection to its exercise that the ordinance is *quasi* criminal in its character.

Same—Franchise—Subsequent Ordinance.—A railroad company which seeks to enjoin an interference with an alleged franchise granted to it by a city ordinance, the validity of which franchise depends upon the construction of the grant, and which the city attempts to destroy by a subsequent ordinance, is not bound to first establish its right at law to such franchise.

Same—Irrevocable Franchise.—A grant to a railroad company by a city ordinance, previous to the adoption of the Alabama constitution of 1875, prohibiting irrevocable grants of special privileges of a right of way along a certain business street, which grant is made under the authority of the charter of the company to obtain by grant from cities any privileges and franchises in reference to the construction, maintenance, etc., of its business, is a grant of an irrevocable franchise.

APPEAL from Mobile County, Chancery Court. The facts are stated in the opinion.

R. H. Clarke for appellant.

Gaylord B. Clarke and *F. B. Clarke, Jr.*, for appellee.

SOMERVILLE, J.—The present bill is filed by the Louisville & Nashville R. Co. against the port of Mobile to enjoin the enforcement of an ordinance of that municipality, which declared it unlawful for any person or corporation to load or unload cars in the public streets of the city, under a penalty of not less than \$25 for each and every violation of the provision. The ordinance excepts cotton, coal, and ice in certain localities, but this exception has no material bearing on the present controversy. The bill claims for the complainant a vested franchise to exercise the right of loading and unloading freight along the line of its track constructed through Commerce street, in said city, and that the enforcement of the ordinance in the manner which has been threatened by the municipal authorities will operate as a total destruction of this valuable franchise, which the company has been peaceably exercising for about 18 years. It is averred that the ordinance in controversy is the exercise of unauthorized municipal power, and is therefore void, and that the defendant corporation, the port of Mobile, is insolvent, and the public officers and others who have undertaken to enforce the ordinance, by the threatened arrest of the complain-

ants' employees, are pecuniarily irresponsible; and facts are stated from which it is made clear that the injury which will be suffered by the complainant in the abrogation of this right, and the consequent paralysis of its business, will be irreparable, and cannot be recompensed by suits for damages at law. We, first, inquire as to the origin and nature of the right or privilege claimed by the complainant; second, whether the ordinance in question operates as an illegal interference with it; and, third, as to the jurisdiction of a court of equity to interfere by the aid of injunctive relief.

1. The basis of the alleged right in the complainant is a grant by the city of Mobile, in the form of an ordinance, passed in September, 1869, for the particular purpose, as the bill alleges, of enabling the railroad to reach the stores and warehouses, situated on Commerce street; this grant being made under the authority of the charter of the railroad company created by legislative enactment. The complainant, as the owner of the charter of the New Orleans, Mobile & Chattanooga R. Co., is shown to be entitled to all the rights vested in that corporation. The charter of the latter company, enacted in November, 1866, expressly authorized the construction of its road across or through any street or highway; the only limitation upon the right being that the usefulness and convenience of such street or highway to the public should not be unnecessarily or materially impaired. Acts 1866-7, pp. 6, 15, § 13. An amendment to this charter, approved February 12, 1867, contained the following provision: "That the said company is hereby authorized and empowered to obtain, by grant or otherwise, from any incorporated city or village within the state, that may be situated upon or at the intersection or *termini* of any of its railroads, any rights, privileges, or franchises that any of said incorporated cities or villages may choose to grant in reference to the construction, maintenance, and management of the railroad of said company, its depots, cars, locomotives, and its business within the limits of such incorporated city or village, as hereinbefore named, is hereby authorized and empowered to grant to said company any such rights, privileges, and franchises as it may deem proper and advisable; and such privileges and franchises, when granted to and accepted by said company from any such incorporated city or village, shall be deemed and taken as rights, privileges, and franchises vested and confirmed in said company, and not liable thereafter to be revoked, changed, injured, or impaired, except with the consent of said company." Acts 1866-67, p. 400, § 5. That the legislature, under the general police power inherent in the state, had the constitutional power to authorize the city of Mobile to grant the right to construct a railroad track, upon which steam-engines are operated,

Basis of alleged right—
Charter provisions.

Legislative power delegated to city.

across and through the streets of that city, must be conceded ; and, after such permission, it would lie in the mouth of no one to complain that the changed use of the street would *per se* be a nuisance. *Perry v. Railroad Co.*, 55 Ala. 413. Under the authority thus conferred in the charter of the company, the city of Mobile, on September 7, 1869, passed an ordinance by which it "granted" to the railroad the right of way through certain streets, including "also the right to lay a single track, with the necessary sidings and turn-outs, from the northern boundary of its depot, . . . through Commerce street, . . . in such manner

Ordinance
granting fran-
chise.

as said company may deem expedient and necessary for its business and interests." Upon the faith of this grant the track of the road was constructed through Commerce street, with the necessary sidings and turn-outs. for the purpose of loading and unloading freight and merchandise into and from the various stores and warehouses located upon said street, and has been ever since continuously used for this purpose from day to day, without complaint or objection from any source, for a period of 17 or 18 years, until the attempted revocation of the ordinance in December, 1886. The privilege thus granted is obviously a franchise of the most valuable kind, being one of the most common examples of such a grant or privilege. *Davis v. Mayor*, 67 Amer. Dec. 186, 193. It is certainly a "right, privilege, or franchise" within the meaning of the company's charter, having reference, as it does, to the construction and management of the railroad, and the conduct of its business of transportation within the limits of the city of Mobile. Such a special privilege, conferred directly by legislative enactment, or in a mode provided for by such enactment, becomes a contract between the state and the corporators, and, as such, has always been protected from impairment by legislative action by virtue of both the federal and state constitutions, each of which prohibits the passage of any law by which the obligation of existing contracts is impaired or lessened. *City of Burlington v. Railway Co.*, 49 Iowa, 144, 31 Amer. Rep. 145. "A grant, in its own nature," observes Chief Justice Marshall, in *Fletcher v. Peck*, 6 Cranch, 87, 137, "amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right,"—a principle which has been held in this state to be applicable to franchises lawfully granted by municipal corporations. *Stein v. Mayor*, 49 Ala. 362, 20 Amer. Rep. 283. The charter itself declares, moreover, that, when once granted in the mode provided for, such a privilege should become a vested and irrevocable right, not liable to be revoked or impaired in any manner. Acts 1866-67, p. 400, § 5. It was not until the present constitution of 1875, now in force in this state, went into operation, that ir-

revocable grants of special privileges of this nature were prohibited. *Railway Cases*, 76 Ala. 469.

2. The privilege in question is none the less a franchise, in the proper sense of that term, because it was granted, not directly by legislative enactment, but by the municipal authorities of Mobile under the sanction of the charter, which is itself a legislative enactment. The grant by the city without such sanction would be unauthorized by law, and void. It is therefore referable to the charter, and may be considered as a grant by the legislature on the condition precedent that the corporate authorities of Mobile should assent to it; that municipality being regarded as a political agent for the state for this purpose, as it is for other governmental and police purposes. A case strongly analogous may be found in the grant of a license by the court of county commissioners, under the authority of the statute, to establish a toll-bridge or a ferry, which have been held by this court to be privileges in the nature of legislative franchises granted directly by the state, and subject, in general, to be governed by the same principles. *Harrell v. Ellsworth*, 17 Ala. 576; *Gates v. McDaniel*, 2 Stew. (Ala.) 211; *Mayor v. Rodgers*, 10 Ala. 37, 49; *Railway Cases*, 79 Ala. 465. This principle seems to us to be based on sound and practical reason, and is essentially just in its results. It is a mere logical sequence of the common adage, *qui facit per alium, facit per se*. An act done by this state, through its duly authorized agent, is an act done by the state itself.

Franchise may be granted by municipality.

3. The chancellor decided that the grant made by the city to the appellee conferred, by necessary implication, not only the right of transit through Commerce street, but the right to load and unload at the adjacent stores and warehouses. In this conclusion we are disposed to concur, notwithstanding the force of the rule that the charters of corporations are to be construed strictly against the incorporators, and what is not unequivocally granted in such acts must be taken to be withheld. The power claimed must, in other words, be granted in clear terms, or else must be necessarily implied. *Railway Cases*, 79 Ala. 472. It has been held by a respectable and learned court that the grant to a railroad company of the mere right of transit through the streets of a city would carry, as a necessary incident, the right to load and unload merchandise, provided ample room was left to accommodate public travel on the street, and the time occupied in exercising the right was reasonably short. *Mathews v. Kelsey*, 58 Me. 56, 4 Amer. Rep. 248. The present case does not require us to carry the principle so far. Here the railroad already possessed the naked right of transit. This had been conferred

Grant conferred right to load and unload.

expressly and directly by legislative enactment, as declared in the original charter. The amendment to the charter would seem, therefore, to have in view the giving of some additional right or privilege. It would otherwise have been useless. The language of the city ordinance bears out this view. It not only confers the right to lay the main track through the street, thus confirming what the company already had, but it goes further, by adding, "with the necessary sidings and turn-outs," and these to be laid in such manner as the railroad company might deem "expedient and necessary for its business and interests." Why, we may ask, give the power to lay these "sidings and turn-outs" along the streets, and within the company's discretion, if the right to use them was to be withheld? The right to lay a track through a street implies by necessary implication the right to use such track in the mode ordinarily adopted by railroad companies, and subject to reasonable regulation under the police power of the proper authorities. The right to lay side-tracks and turn-outs, in like manner, implies the right to use them, and the only use which could be reasonably contemplated by their construction is for the transportation of goods to and from the adjoining stores and warehouses. Add to this the significant fact that the railroad company, after being placed in possession of its franchise, construed it to confer this right, and exercised it uniformly, without complaint or interruption, for between 17 and 18 years. A contemporaneous construction of a law is of very high authority. The practical exercise of a right under it, acquiesced in by the public, and not denied by those adversely interested, is the strongest evidence that it has been rightly interpreted. The practical construction, thus established by years of uniform usage, is often allowed by the courts, even in doubtful cases, to have the force of settled law. A like rule prevails in the construction of contracts; the court being always strongly inclined to interpret every agreement as the parties themselves have done by practical usage, regarding their conduct, in the every-day execution of its terms, as an agreed interpretation of them. Our conclusion is that the railroad company was possessed of an irrevocable franchise, conferred by the city ordinance, giving it the right to load and unload freight at its sidings and turn-outs, constructed on Commerce street, subject to the limitation only that the use of the street by the public should not be unnecessarily or materially impaired.

4. The ordinance of December, 1886, here sought to be enjoined, is a manifest attempt to abrogate this privilege, by declaring its exercise unlawful, and fixing a penalty to it. The announced determination of the police authorities to arrest all employees of the road who seek to exercise the franchise, if executed, must operate to its utter destruction. The allega-

tions of the bill, which the demurrer admits to be true, negative all facts from which it is possible to suppose that the purpose of the objectionable ordinance was to abate a nuisance. There is no sort of pretense that it was a mere police regulation. There is no complaint on the subject from those most interested in the use and occupancy of the highway. It comes from those who neither are property-holders, nor engaged in business there. Facts, moreover, are averred from which it seems clear that the loading and unloading of cars of freight by the railroad along the street, so far from seriously obstructing travel and traffic by the public, greatly facilitate the convenient use of the streets for these purposes, by relieving it of the burden of being constantly crowded with drays and other vehicles. The case, therefore, raises no question as to a resort to the police power of the city or state to abate an alleged nuisance, or as to an attempted regulation of an admitted right. The purpose of the defendant corporation is obviously to destroy the franchise which it has conferred; and the ordinance under consideration, having this effect, if executed, must be held to be void.

No question as to resort to police power raised.

5. The jurisdiction of a court of equity to protect a franchise of this kind from unlawful invasion or disturbance is clearly settled, and has been often recognized by this court as benign and salutary. The value of such a right, or the cost of its unlawful disturbance, cannot be reduced to a pecuniary measure. When the purpose is its utter destruction, the duty to protect becomes correspondingly more urgent and imperative. The ground of its exercise is usually the prevention of irreparable injury, or such as cannot be adequately estimated in damages at law; at other times, the avoidance of a multiplicity of suits, and again the abatement of annoyance in the nature of a legal nuisance. Another controlling reason for interference by equity in such cases is that the public at large have an interest in the protection of such a privilege, as well as the parties particularly interested. *Stage Co. v. Society*, 15 Abb. Pr. (N. S.) 51. The party aggrieved is not required to establish his right at law, before he is permitted to invoke the aid of equity, if such right is clear and free from doubt. The verdict of a jury is only necessary where the right claimed is doubtful. The right is here determined by a municipal ordinance in the nature of both a grant and a contract, which is in writing. Its construction is for the court, and not for the jury. *Mayor v. Rodgers*, 10 Ala. 37; *Turnpike Co. v. Ryder*, 1 Johns, Ch. 611; *Harrell v. Ellsworth*, 17 Ala. 576; *Turnpike v. Miller*, 9 Amer. Dec. 274; *Com. v. Railroad Co.*, 24 Pa. St. 159, 62 Amer. Dec. 372; *Attorney-general v. Heishon*, 18 N. J. Eq. 410, 2 Dill. Mun. Corp. § 907.

Jurisdiction of court of equity.

6. It is too clear for argument that it is no objection to the exercise of this jurisdiction that the attempted invasion of the franchise sought to be protected is accompanied by acts which are personal trespasses. A court of equity will not, it is true, interfere to enjoin a mere trespass of an ordinary character either upon the person or property. The remedies afforded at law are deemed adequate in cases of this kind. *Railroad Co. v. Walton*, 14

Personal trespasses no objection to exercise of jurisdiction.

Ala. 207. But the cases are numerous in which the arm of this court has been successfully invoked to enjoin trespasses, which, if unrestrained, would probably result in irreparable mischief, or where such mischief might be completely effected before a trial at law could be had as to the controverted right. Judge Story thus states the rule: "If the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly, indeed, they were extremely reluctant to interfere at all, even in regard to repeated trespasses. But now there is not the slightest hesitation if the facts done, or threatened to be done, to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future. If, indeed," he concludes, "courts of equity did not interfere of cases of this sort, there would be a great failure of justice in the country." 2 Story, Eq. Jur. § 928. The chancery court of England had come up to this advanced view of the law as early as the days of Lord Hardwicke. *Coulson v. White*, 3 Atk. 21. And this view is now supported by an unbroken array of uniform authorities, speaking with one voice on the subject. *Jerome v. Ross*, 7 Johns. Ch. 315, 11 Amer. Dec. 484, note, 498-507; *Lyon v. Hunt*, 11 Ala. 295, 46 Amer. Dec. 216; *Scudder v. Falls Co.*, 23 Amer. Dec. 756; *Poindexter v. Henderson*, 12 Amer. Dec. 550; *Burnley v. Cook*, 13 Tex. 586, 65 Amer. Dec. 79; *White v. Flannigain*, 1 Md. 525, 54 Amer. Dec. 668. The case of *Osborn v. Bank*, 9 Wheat. 738, is a familiar and high authority, from one of the greatest of judges, for the position that where a trespass, or a series of trespasses, operate, in effect, to destroy or seriously impair the exercise of a franchise, a court of equity will not hesitate to interpose to prevent the apprehended injury by the aid of injunction. And in *Stage Co. v. Society*, 15 Abb. Pr. (N. S.) 51, it is expressly held that an injunction would lie to restrain the persistent commission of trespasses of a mere personal nature, where they affect a corporate franchise. And the same principle has been recognized by this court in a case where it was sought to enjoin the enforcement of a municipal ordinance, the violation of which was attended with a penalty. *Moses v. Mayor*, 52 Ala. 198. The equity of the present bill can be supported upon the ground

that the court will lend its aid to prevent the destruction or serious impairment of a vested franchise, the value of which cannot be adequately estimated in damages. The case is strengthened by the further consideration of preventing expensive and vexatious litigation accompanied by a multiplicity of suits, and the insolvency of the defendants, by whom the alleged grievances are threatened,—facts which strongly corroborate the alleged inadequacy of any legal remedy open to the complainant in the courts of law. The records of our courts present few cases of threatened injury so irreparable in nature, or for which a verdict of damages at law would furnish so inadequate compensation. *Jerome v. Ross*, 11 Amer. Dec. 484, note, 500-507.

7. The suggestion that the court, under the peculiar circumstances of this case, must abdicate this jurisdiction because of the fact that it is dealing with an ordinance of a municipal corporation of a *quasi* criminal character, the violation of which is made an offence, does not strike us favorably. The power to prevent irreparable injury flowing from the deficiencies and injustice of the more technical rules of the common law, may be said to be the very life of equity jurisdiction. The court must, therefore, be jealous of its preservation, notwithstanding it may also be cautious in its exercise. Municipal corporations can claim no exemption from being subject to it. They must stand in our courts upon terms of equality with all other corporations and with natural persons. Our constitution declares that "all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons." Const. 1875, art. 14, § 12. "The legal effect of this provision is to place municipal corporations, as nearly as practicable, upon a basis of equality in the enforcement and defence of their rights in courts of justice in this state." *Railroad Co. v. Morris*, 65 Ala. 193; *Davis v. Mayor*, 1 Duer, 452. And the rule, accordingly, must apply with peculiar force with us, which is said by Mr. Dillon to be generally recognized elsewhere, that "equity will interfere in favor of or against municipal corporations on the same principles by which it is guided in other cases." 2 Dill. Mun. Corp. § 908. It cannot be tolerated that a municipal corporation, in view of these principles, should escape the grasp of a court of chancery, in a clear case of equitable cognizance, by the device of adding a penalty to an illegal and void ordinance, which is designed as a repudiation of its own valid grants or contracts, especially in a case where the public are largely concerned, and a court of law can afford no remedy adequate for the prevention of irreparable injury that would probably result from the enforcement of such ordinance.

Fact that ordinance is quasi criminal immaterial.

There is nothing in the case of *Burnett v. Craig*, 30 Ala. 135, 68 Amer. Dec. 115, which is in conflict with the foregoing views, as will appear from the later case of *Moses v. Mayor*, 52 Ala. 198. The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights. 1 High, Inj. § 20; *Mayor v. Radecke*, 49 Md. 217, 33 Amer. Rep. 239; *Railroad Co. v. New York*, 54 N. Y. 159; *Mayor v. Waring*, 41 Ala. 139, 8 Wall. 110. The decree of the chancellor, refusing to dismiss the bill for alleged want of equity, and refusing to dissolve the injunction, is in harmony with the foregoing views, and must be affirmed.

Grant of Franchises by Municipality.—See, *ante*, *Forman v. New Orleans & C. R. Co.* 38; *State v. Hilbert*, 118.

What Grant of Right to Bulld Road In Street Carries with it.—*St. Louis, etc., R. Co. v. Belleville*, 32 Am. & Eng. R. R. Cas., 278, note, 283.

DODGE *et al.*

v.

PENNSYLVANIA R. CO. *et al.*

(*Court of Chancery of New Jersey, 1888.*)

Municipal Corporation—Railroad in Street—Injury to Public Rights—Private Action.—For injuries resulting from the violation or destruction of public rights, in cases where no private, individual right is injuriously affected, no private action can be maintained.

Same—Surrender of Public Rights—Compensation.—Except in the instances where statutory provision to the contrary exists, the law gives no compensation for losses resulting from the surrender of public rights.

Same—Preliminary Injunction—What Must be Shown.—A complainant to entitle himself to a preliminary injunction, to protect a right which he claims in land, must show that on the undisputed facts of his case, and according to the established law of the state, he possesses the right which he claims.

Same—Abutting Property—Conveyance—Grantee Takes Fee to Middle of Street.—A grantee of land abutting on a public street, if his grantor owns the fee of the street, takes to the middle of the street, by mere force of legal construction unless a contrary intention is apparent.

Same—Prepared Street—Right to Use.—And where lands are conveyed as abutting on a proposed street, and the street extends over other lands of the grantor than those conveyed, a right to the use of the proposed street, as a means of passage to and from the lands conveyed will arise, by implication in favor of the grantee on the delivery of the deed, and will continue in force until the proposed street becomes a public highway.

Same—Vacation of Street—Reversionary Interest.—Whether such private right will merge in the public right when the proposed street becomes a public highway, and will be extinguished with the public right if the street is afterwards vacated, or will revive on vacation, is a question on which judicial opinion is at variance, and is, as a matter of law, unsettled in this state.

Same—Use of Street by Railroad—Injunction—When Granted.—Nothing short of the threatened destruction of property of great value, by acts of wanton lawlessness, inflicting injuries which must result in irreparable damage, will justify the granting of an injunction staying an important public work.

ON Application for Injunction. Heard on bill and affidavits on the part of the complainants, and affidavits on the part of the defendants. The facts are stated in the opinion.

William C. Spencer, Edward A. Day, and Theodore Runyon for complainants.

James B. Vredenburg, Gilbert Collins, and Joseph D. Bedle for defendants.

VAN FLEET, V. C.—Three hundred and ninety-five feet of a highway in Jersey City, known as Green street, have been vacated by the proper authority of that city. The general direction of Green street is from north to south, extending from Harsimus cove, on the north, to the basin of the Morris canal, on the south. The part vacated is now covered by the tracks of the Pennsylvania R. Co. The tracks and the street are on the same level; running, however, in different directions. The tracks run from west to east, and the street from north to south. The residue of the street, both north and south of the part vacated, will be left intact, and remain a public highway. The public right in the street, to the extent above indicated, has been surrendered to enable the Pennsylvania R. Co. to elevate the tracks of their road in Jersey City from Brunswick street, a point about 1,500 yards west of Green street, to the end of their road. This surrender was made in fulfilment of a contract made by Jersey City with the Pennsylvania R. Co., under the authority of a statute passed in 1874. That statute enacts "that the proper municipal authorities, respectively, of any city of this state, be, and they are hereby, authorized and empowered to enter into such contracts with any of the railroad companies whose roads enter their cities, respectively, to secure greater safety to persons and property therein, whereby said railroad companies may relocate, change, or elevate their railroads within said cities, or either of them, as in the judgment of such municipal authorities, respectively, may be best adapted to secure the safety of lives and property, and promote the interests of said cities, respectively; and for that purpose shall have power to vacate, alter the lines, and change

Facts.

the grades of any streets or highways therein, and to do all such acts as may be necessary and proper to effectually carry out such contracts. And any such contracts, made by any railroad company or companies with said cities, or either of them, are hereby fully ratified and confirmed." Revision, p. 944, § 163. The plan adopted by the Pennsylvania R. Co. for the elevation of their road, and approved by the proper municipal authority of Jersey City, renders it necessary that that part of Green street which has been vacated shall be closed, and the street at that point was vacated for the purpose of authorizing the railroad company to construct the road-bed on which their elevated tracks are to be laid within the lines of the street. There is no dispute that, if the defendants are allowed to carry out their present purposes, Green street, to the extent that it has been vacated, will be effectually and permanently destroyed as a way of any kind. The complainants claim that the destruction of that part of the street which has been vacated will do them irreparable injury, and they ask to be protected against such injury by injunction.

The complainants own lands on both sides of Green street, but none on that part of it which has been vacated. Their lands lie over 500 feet to the north of the place where the street has been vacated, with a cross street intervening between their lands and the place vacated. Their lands are improved. Their bill describes their improvements on the west side of the street as "planing-mills, lumber-sheds, and other buildings for box-manufacturing and wood-working and storing lumber," and on the east side of the street as "a brick building for office and business purposes." The complainants' title originated in two deeds made by a corporation known as the "Associates of the Jersey Company;" the first bearing date May 20, 1844, and the second April 2, 1845. Long prior to the date of these deeds, and as early as 1804, Green street, although then under the tide-waters of the Hudson river, both in front of the lands now owned by the complainants, and at the point where it has been vacated, was, in legal theory, at least, a public highway. The Associates of the Jersey Co. were, by their charter, made competent to take title to certain lands in fee, and to grant and dispose of the same at their pleasure, and they were also granted important municipal powers. They were given power to make and lay out streets. This power, it has been decided, embraced, not only the upland which they were authorized to acquire, but also land under water. *Jersey City v. Canal Co.*, 12 N. J. Eq. 556. They exercised the power of laying out streets, by making a map on which the streets they intended to establish were laid down. This map was subsequently filed. It is known as the "Mangin Map." Green street appears upon it. It is one of

streets laid out by the associates. The streets laid down on this map became at once, on the adoption of the map, in consequence of the dual character in which the associates acted, public highways. Mr. Justice Whelpley, speaking for the court of errors and appeals, in the case just cited, said: "When, therefore, they [the associates] laid out these streets, they acted as owners of the fee in presenting the lands to the public for streets, and also as a municipal corporation in accepting them on behalf of the public; so that when the Mangin map was completed, and adopted by them as the plan of their city, the streets laid down upon it became such by an act of dedication made by the owners of the fee, and immediately accepted by a competent authority on behalf of the public, and also by act of laying out by legislative authority." The lands now owned by the complainants were conveyed by the associates to the persons in whom the complainants' title originated—to the founders of their title—by direct reference to the Mangin map. They were described in the deeds made by the associates as laid down on that map, and as abutting on and bounded by Green street; and they have been so described in each subsequent conveyance down to those under which the complainants hold. The complainants contend that these conveyances, according to well-settled principles of legal construction, vested in their predecessors in title, and consequently in them as the successors to that title, an easement and right of way over all the streets laid down on the Mangin map, and particularly in and over Green street as appurtenant to the lands conveyed, which right, they insist, constitutes a part of their private property, of which they cannot without a violation of their constitutional rights, be deprived without their consent, unless just compensation be first made. The defendants do not intend to make compensation.

The private right thus claimed is the sole foundation of this action. It has no other. Indeed, it can have no other. For injuries resulting from the violation or destruction of public rights, in cases where no private, individual right is injuriously affected, no private action can be maintained. Such wrongs can only be redressed by a suit on behalf of the public, either by indictment or an information by the attorney-general. The established rule on this subject is too familiar to require the citation of authorities. The public right in that part of this street which has been vacated has been surrendered. That surrender has been declared valid by the supreme court. Subsequently to the filing of the bill in this case, an application was made for a *certiorari* to remove the proceeding by which the vacation was effected. The writ was refused; the court declaring that the public right had been surrendered by competent authority, exercising

Surrender of
public right—
No compensation
therefor.

a valid power. "A public road," as was said by Judge Black in *Paul v. Carver*, 24 Pa. St. 207, "belongs to nobody but the state; and, when the government sees proper to vacate it, the consequential loss, if any there be, must be borne by those who suffer it, just as they would bear what might result from a refusal to make it in the first place." Except in the instances where statutory provision to the contrary exists, the law gives no compensation for losses resulting from a valid surrender of public rights. And this is so, because, ours being a government by the people, such surrenders can only be made by the people's representatives; and as they generally hold office for short periods of time, and must exercise their power in the face of the people, it is assumed that their power in this respect will never be exercised except when the public good imperatively demands it.

The complainants, to entitle themselves to the writ they ask, must have demonstrated that, on the undisputed facts of this case, and according to the established law of this state, they have such right in that part of Green street which **Complainants' title in street.** has been vacated as they claim. The rule upon this subject is jurisdictional. It is a limitation upon the power of the court, which the court cannot transcend. *Coach Co. v. Railroad Co.*, 29 N. J. Eq. 299; *Leonard v. Hart*, 42 N. J. Eq. 416. The point in dispute, it will be perceived, presents a pure question of legal title, which may be stated as follows: What right did the deeds made by the associates grant to the complainants' original predecessors in title in Green street, not in front of the lands conveyed, nor in that part of Green street extending both north and south of the lands conveyed to the two next adjacent cross-streets, but in that part of Green street which lay entirely beyond the two next adjacent cross-streets? As to the fee of the street in front of the lands conveyed, the law is settled. **Grantee of abutting land takes to middle of street.** A grantee, in such case, if his grantor owns the fee of the street in front of the land conveyed, takes to the middle of the street by mere force of legal construction, unless a contrary intention is apparent on the face of the deed, or is unmistakably shown by the situation of the parties and the nature and character of the transaction. *Salter v. Jonas*, 39 N. J. Law, 469. And it would seem, also, to be settled, that where a grantor conveys land as abutting on a proposed street, and the street extends over other lands of the grantor than those conveyed, a right to the use of the proposed street, as a means of passage to and from the land conveyed, will arise, by implication, in favor of the grantee on the delivery of the deed, and continue in force until the proposed

street becomes a public highway. This is the doctrine established by *Booraem v. Railway Co.*, 40 N. J. Eq. 557, as I understand that case. The language of the learned justice who drew up the opinion of the court of errors and appeals in that case, on this point, is as follows: "Whenever a dedication as a public highway is effected—as it usually is—by means of conveyances to private persons by reference to a proposed street, over other lands of the grantor, the private rights of the several grantees precede the public right, and are the source from which the public right springs. By such conveyances, the grantees are regarded as purchasers by implied covenant of the right to the use of the street, as a means of passage to and from their premises, as appurtenant to the premises granted; and this private right of way in the grantees is wholly distinct from and independent of the right of passage to be acquired by the public." This right in the street, which is thus recognized as passing to the grantee, rests entirely upon implication; for, if regard were had alone to the words used to describe the thing granted, and they were construed according to their natural sense, and as they are universally understood, when applied to any other monument as a boundary, it is clear that all right in the street would have to be held to be excluded, for the street is mentioned, not as a part of the subject of the grant, but as defining the limit or boundary of the thing granted. They take the grantee to the street, but give him nothing in it. Such implication is, however, made, in cases like the one mentioned in the opinion just quoted, to give effect to what has been described as "the paramount intent of the parties, as disclosed by the whole scope of the conveyance, and the nature of the property granted;" and where land is conveyed as abutting on a proposed street, before a public highway in fact exists there, and a way over such proposed street is essential to the beneficial enjoyment of the land granted, or even a desirable accessory to it, the implication that, until the proposed street becomes an actual highway, the grantee shall have the use of it as a means of passage to and from his land, seems not only to be reasonable and just, but absolutely necessary to give effect to the manifest intention of the parties. But that case, it will be observed, differs in a very material respect from the case in hand. The lands here were conveyed, not as abutting on a proposed street, but on a street which was a public highway in law. When that is the case, the grantee gets everything which it can be said he expected to get, or which he supposed the grantor intended to grant to him, and there is therefore nothing to be supplied by implication.

The precise question, then, which this case presents, is this: Is it settled as a matter of law, in this state, that if any part of

Question presented—
Whether subsequent grantee has private right of way.

a public street is, at any time subsequent to the date of a conveyance of land abutting on it, abandoned or surrendered, that the grantee named in such conveyance takes, by implied grant or covenant, a private right of way over that part of the street in which the public right has been extinguished? I know of no case decided by a superior court in this state which so declares the law; none was cited on the argument of this motion. The question is one on which the courts of our sister states are at variance. The opinion in *Booraem v. Railway Co.*, *supra*, says: "There is some controversy whether the private right of way in grantees, holding by such conveyances, is merged in the public right, when the dedication is consummated by public acceptance, or whether it is merely suspended thereby, and will revive if the public right is afterwards abandoned." There are several adjudications, made by courts distinguished for the ability and learning of their judges, which hold that, when the public right attaches, the preceding private right is thereby extinguished, and that, if the public right is subsequently surrendered, the adjacent owner takes the land to the middle of the street, discharged of all right of way. *Mercer v. Railroad Co.*, 36 Pa. St. 99; *Insurance Co. v. Stevens*, 101 N. Y. 411, 5 N. E. Rep. 353; *Kimball v. City of Kenosha*, 4 Wis. 336; and *Bailey v. Culver*, 84 Mo. 531,—are cases of this class. The adjudications standing in conflict with this view are perhaps more numerous than those supporting it; but which of the two conflicting doctrines is most consonant with right reason and sound public policy this court has no authority to decide. That question, like all other questions of legal title, falls within the exclusive jurisdiction of another tribunal.

Clark v. City of Elizabeth examined.

The case mainly relied on by the complainants in vindication of the right on which they found their claim to an injunction is *Clark v. City of Elizabeth*, 40 N. J. Law, 172. The disputed question in that case was whether Clark, the plaintiff, was entitled to compensation for the land which the city authorities were about to take for a street. Clark, in 1869, conveyed certain of his land, and described them as abutting on a street called "Bayway." Bayway, at the date of the conveyance, had not been opened as a street in front of the land conveyed, but had been previously laid out as a street by commissioners having authority for that purpose, and so designated on a map made by them. When the city, in 1870, proceeded to appropriate the land for street purposes, Clark claimed compensation. The lands he conveyed in 1869 were not only described as abutting on Bayway, but a direct reference was made, in the description of them, to the commissioners' map. The question which the case presented

for judgment was whether or not Clark had by his deed, so effectually dedicated his lands, within the lines of the street, to public use, as to extinguish all right to compensation. Both the supreme court and the court of errors and appeals decided that he had. The distinguished chancellor who wrote the opinion of the court of errors and appeals says, in substance, *arguendo*, to demonstrate that Clark had no right to be compensated for the land taken, that Clark's grantee, in the deed of 1869, acquired, by implied covenant, a right of way over all Clark's land in the site of the street, not only to the two next adjacent cross-streets, but as far as his lands extended. This was said, it must be remembered, in a case where the grantee was not before the court as a party, and where his rights were in no way presented for adjudication, and where the facts out of which the controversy grew were altogether different from those involved in the present litigation. But if we adopt the rule laid down in this opinion as a correct statement of the law on this subject, we are still without an authority vindicating the legal right set up by the complainants in this case. The right of way which, by this rule, is accorded to a grantee, is limited to the land of his grantor in the site of the street at the date of his conveyance. That is its utmost extent. His grantor, it is certain, could not, even by an express grant, give him a right in the lands of another person, nor in lands previously granted out by him to another person; much less would it be possible to effect such a result by means of a presumption or implication. The complainants' title originated, as has already been stated, in 1844 and 1845. Prior to that date, and as early as 1838, the proofs show that the defendants' predecessors in title—the New Jersey Railroad & Transportation Co.—were in possession of that part of Green street which has been vacated, and were using it for railroad purposes, and that they and the defendants have continued to so use it, without interruption or disturbance, from that time to the present. At the time the complainants' predecessors in title acquired title to the lands which the complainants now hold, the *locus in quo* was located very near the eastern terminus of the defendants' railroad, opposite the city of New York, and where, it was obvious, it would be necessary, as the business of the railroad increased, that the railroad corporation should provide itself, from time to time, with additional terminal facilities to enable it to discharge its duties properly to the public. There are now on the *locus in quo* 33 different railroad tracks, and a train movement of some kind over some part of it every 30 seconds each secular day, from 6 o'clock in the morning to 6 o'clock in the evening. The defendants' use of the *locus in quo* is practically exclusive, and has been so for years. The source of their title is not shown, but the fact

that they have been in undisturbed possession for nearly 50 years, making such use of the land as, for a large part of that time, has been exclusive, would seem to exclude all doubt that they hold by a title which cannot be impeached. Their possession, from its commencement, must, under the circumstances, be regarded as rightful, and consequently their title must be held to stand prior in date to that of the complainants. The complainants' predecessors in title undoubtedly took the land in question subject to the public right or easement therein; but that fact does not help the complainants. They claim that they have a private right in the land, distinct entirely from that which the public once held; and to maintain this claim they are bound to establish that it is settled, as a proposition of law, that it was competent for the original grantor of their title to create, by implied covenant, the right which they claim, not in his own lands, but in lands which he had previously granted to another person. That, I think it must be admitted, is a legal proposition which as yet has not received judicial sanction in this state.

The only reported case decided by our courts bearing a close resemblance to the case under consideration is that of *Railroad Co. v. Prudden*, reported, first, in 19 N. J. Eq. 386, and, on appeal, in 20 N. J. Eq. 531. The complainant, in that case, acquired title to lands abutting on Dickerson street, in the village of Dover, in 1837 and 1839. His grantor had dedicated the land in Dickerson street to public use as a highway as early as 1831. The defendants, in constructing their railroad through Dover, laid a single track, in 1847, longitudinally over Dickerson street. The street was vacated in 1848, and in the same year the defendants obtained a deed from the successors in title of the complainants' grantor, purporting to convey the fee of the street to them. The defendants, in 1867, attempted to lay a second track longitudinally over the land which, prior to the vacation, had constituted Dickerson street, but not upon that half which, by construction of law, passed to the complainant under his deed. The complainant then filed his bill, asking that the defendants be enjoined from laying the second track in front of his lands. Chancellor Zabriskie ordered an injunction to issue. This order, on appeal, was reversed. Mr. Justice Depue, in stating the reasons for reversal, said, among other things: "What rights the complainant acquired in the street beyond the *medium filum viæ*, by his deed of conveyance, and the effect of the vacation of the previously existing highway, are questions proper for the determination of a court of law." The questions involved there were the same precisely as those presented here. They are still open and undetermined.

On the ground that the legal right on which the complainants

rest their claim to an injunction is, as a matter of law, wholly unsettled, they must be refused the writ they ask. When the *gravamen* of the complainant's case is, as it is here, that defendant has been guilty of unconscientious conduct, in depriving him of the enjoyment of his legal rights, to his irreparable injury, it is a condition precedent to the complainant's right to bring his adversary into a court of conscience, that his adversary's unconscientious conduct shall be either admitted, or shall have been established against him by a judgment at law. *Outcalt v. Helme*, 42 N. J. Eq. 665. It should be said in addition, I think, that, if an exactly opposite conclusion had been reached as to the character of the right which constitutes the foundation of the complainants' action; it would still have been the duty of the court to deny the writ they ask. The change which the defendants propose to make in their road is one in which the public have a very deep interest. It will make travel, both on the railroad and the highways of Jersey City, more expeditious than it is at present, and it will give greater security to human life, by removing dangers which now exist, and which imperil it, to a greater or less extent, every day in the year. That the change is proper and necessary, to the end that life and property may be made more secure, and to promote the best interests of Jersey City, is a question which has been finally concluded by the judgment of that municipal body to which the legislature thought proper to submit it. From that judgment there can be no appeal to this court; except on the ground of fraud. It is the duty of this court, in ordinary cases affecting purely private rights, and where no public interest is involved, to exercise its prohibitory power with the utmost caution; to compare consequences in advance, to see whether, if it exercises this one of its attributes, it will not inflict upon the defendant greater injury than the complainant will suffer if it withholds its hand, and leaves him to pursue his ordinary legal remedy; but in cases like the present, where, if the court acts, an important public work, designed to free public travel from peril, and to give greater security to human life, will be arrested and seriously delayed, nothing short of the threatened destruction of property of great value, by acts of wanton lawlessness, inflicting injuries which, if not prevented, must result in irreparable damage, will justify the court in issuing a command that the work shall stop. The duty of granting or refusing an injunction is a matter resting in sound discretion. It should never be granted when it will operate oppressively, or contrary to the real justice of the case, or where it is not the fit and appropriate method of redress under all the circumstances of the case, or where it will or may work a fatal injury.

Reasons for
refusing in-
junction.

The injury against which the complainants ask to be protected is one arising entirely from inconvenience. The only harm which it is possible for them to suffer from the closing of Green street is that in going from their improvements on Green street to the ferry, across the Hudson river, and to some other places, the distance which they will be compelled to travel will be increased between eight and nine hundred feet. Green street, it will be remembered, is to be closed only at a single point, and for a distance of only 300 feet; all the rest of it is to remain a highway. The next parallel street to the west is distant only 400 feet from Green street; so that a person by going from Green street to the next parallel street, thus making a *detour* from a direct line of about 400 feet, and then passing along that street to a point beyond the railroad, and then down a cross-street, another distance of about 400 feet, will be back again in Green street at a point beyond where it is to be closed. The inconvenience arising from this increase in distance can scarcely be regarded as an injury sufficiently substantial or serious to make the interposition of this court, by injunction, necessary or proper, when the present condition of Green street, at the point where it is proposed to close it, is considered. There are 33 different railroad tracks there, over which trains are almost constantly moving. The complainants do not pretend that such occupancy and use of this part of the street by the defendants is unlawful. As a way, the street, at this point, is neither free, safe, nor convenient. On the contrary, it is almost constantly obstructed by moving trains, which render its use for the purposes for which a highway is ordinarily used both difficult and dangerous. Its condition is such that it is manifest that no prudent person would attempt to use it for the purposes of ordinary travel, except under the pressure of an urgent necessity. There is no proof that the complainants make any use of it at all. The only statement upon that subject to be found among their proofs is one made by their solicitor, who says, in his affidavit: "The premises and buildings on the complainants' land on the west side of Green street are principally occupied by the Dodge & Bliss Box Company for manufacturing boxes; and that almost all the boxes made by them are delivered in New York by teams, which go there by the way of Green street and the ferry at the foot of Exchange place." But how many teams go,—one a day, or one a week? Where did the affiant get his information that the teams go by the way of Green street? Did somebody tell him, or does he speak from personal knowledge? That he speaks from personal knowledge would seem to be scarcely possible. He is a lawyer engaged in active practice, distinguished for his

Complainants
suffer inconvenience
merely.

No proof that
complainants
used street.

industry and the zeal with which he guards the interests of his clients, and whose time during the business hours of each day, it is reasonable to suppose, is wholly occupied by his engagements at his office and in the courts. The court cannot assume that, for weeks prior to the filing of the bill in this case, this gentleman took a position near this crossing, and stood there from day to day, to see that the teams which carried the boxes made by this corporation to New York always passed over this crossing, when, if that had been the route which the teams usually took, that fact could have been so easily and satisfactorily established by the oaths of the persons who drove the teams.

Both on the ground that the legal right on which the complainants' action rests is not clear, and that the injury against which they ask to be protected is too insignificant to entitle them to an injunction, their application must be denied, with costs.

Injunction to Restrain Occupation of Streets by Railroads.—See *Kavanagh v. Mobile, etc.*, R. Co., 32 Am. & Eng. R. R. Cas. 267, note, 270.

TODD *et al.*

v.

MINNEAPOLIS AND ST. LOUIS R. CO.

(*Minnesota Supreme Court, September 4, 1888.*)

Railroads in Street—Obstruction of Highway—Measure of Damages.—The plaintiffs were engaged in buying wheat at a warehouse owned by them on the line of the defendant's railway, for manufacturing into flour at their mill to which the wheat was shipped, and in selling the products of the mill at the same warehouse; and, while so engaged, and for a considerable time, their business was interrupted and interfered with by the obstruction of a street leading to the same by the unlawful occupation thereof with the defendant's cars and trains. *Held*, that, in estimating plaintiff's damages caused by such obstructions, evidence of the diminution of the profits of their business, including the manufacture of flour, was incompetent, as embracing too many elements of uncertainty to form a basis for estimating damages.

APPEAL from District Court, Freeborn County.

B. S. Lewis for Minneapolis & St. Louis R. Co., appellant.

Lovely, Morgan & Morgan for Todd *et al.*, respondents.

VANDERBURGH, J.—The plaintiffs claim damages for alleged injuries arising from the diminution and interruption of the busi-

ness of their warehouse for a year or more prior to about August 1, 1882, by reason of the unlawful obstruction of a highway or street, leading across the depot grounds of defendant,

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with its cars and trains, thus preventing access thereto by the public. For about the space of two years prior to October 1, 1881, the plaintiffs owned and operated a warehouse situated on one of the railway tracks of the defendant, and westerly and adjoining its depot grounds and yard, at Albert Lea, in this state, and were engaged in the business of buying and shipping wheat and selling flour and feed. It was built upon ground leased of the defendant; and plaintiffs allege that the defendant had previously dedicated and laid out for the use of the public the street in question across its depot grounds, extending to the location of plaintiffs' warehouse, and communicating directly with one of the principal streets of the city, and thereby furnishing the only practicable and available way of approach and access to their warehouse for farmers bringing their wheat to market, and for purchasers of flour and feed. It is alleged that the street was kept open by defendant, and not seriously obstructed, till about the 1st of October, 1881, and that thereafter and until about August 1, 1882, the defendant permitted the same to be unlawfully occupied by trains and cars standing thereon, resulting in a serious interruption of travel over the street, and a great hindrance and damage to plaintiffs' business; and that at the last the defendant proceeded to erect a gate across the street, and to occupy it with additional tracks laid over the same, so that the plaintiffs were obliged to remove their warehouse to the opposite side of the depot grounds.

Assuming that there was evidence in the case tending to establish the dedication and opening of the street as a highway for the use of the plaintiffs and the public, and also the fact that

the street was unnecessarily or unwarrantably obstructed by the defendant in the operation of its trains and by standing cars, the principal remaining

**Recovery for
loss of profits
by defendants.**

question in the case is whether, in addition to the necessary expenses of removing their warehouse, and the value of its use until re-established, the plaintiffs were also entitled to recover under the evidence for the loss of the profits of their business during the time it is alleged to have been hindered and interrupted. The plaintiffs were also proprietors of a flour-mill situated a few miles away on the line of another railroad connecting at Albert Lea with the defendant's road, and the purchases of wheat at the latter place were wholly for shipment to their mill, to be there manufactured into flour, and not to sell again; and all the flour and feed by them sold at their warehouse was the product of the mill. It was not, however, all shipped to Albert Lea; nor does it appear that the plaintiffs

might not or did not purchase wheat for their mill at other stations. The profits of their business, then, would depend upon the cost of the wheat, the expense of manufacturing, the quality of the products, and the price obtained therefore. We are of the opinion that the plaintiffs failed to make a case for the allowance of profits. They were not dealers buying and selling wheat, and buying and selling flour, upon commission or upon their own account. The supplies of grain for their mill were not necessarily or in fact obtained altogether from their warehouse at Albert Lea. And no attempt was made to show what, if any, extra expense was actually incurred in supplying the deficiency, if any, arising out of the diminution in the receipts of grain there. And so, also, as to the alleged falling off in the sales of flour and feed at the warehouse, it does not appear that the products were not all actually sold, nor that they were not finally sold at a profit, or what, if any, loss was occasioned in the delay or diminution of sales. It must also be considered that the wheat market at any particular warehouse must necessarily involve many elements of uncertainty—the delivery of wheat depending upon the price, state of the weather and roads, competition of other dealers, as well as the question of accessibility. We think the evidence offered insufficient to establish plaintiffs' loss of profits upon the sales of flour and for the non-delivery of wheat, and that the defendant's requests to that effect should have been given. The loss of profits was not shown with reasonable certainty. The facts of this case clearly distinguish it from the cases cited by plaintiffs' counsel.

2. One of the plaintiffs was permitted to testify, against the objection of the defendant, to the entire loss to their business from the cause alleged during the time specified in the complaint; the witness stating that it was the sum of \$6500. This was error. The question was one of Testimony as to entire loss to business. fact, and not of opinion; and it was one which the jury were to ascertain from facts in evidence sufficient at least to base a reasonably safe conclusion upon as to the extent of the damages attributable to the alleged wrongful acts of the defendant. Nor was this error cured by subsequent explanations and statements of fact by the witness. They were altogether too indefinite in their character, as a basis for the judgment of the jury. And, as before stated, it did not appear that all the products of the mill were not sold, or, if sales were delayed, that they were not finally sold at a profit, or that the diminution in the shipments of wheat was not made up by purchases at other stations or warehouses, or what commissions were required to be paid for extra supplies for the mill. From the complicated nature of the business, it might indeed be difficult for a witness to find any satisfactory basis for an estimate

of the loss of plaintiffs' profits caused by defendant's alleged wrongful acts. Order reversed.

Damages for Loss of Time, Injuries to Business, etc., Caused by Railroad Obstructing Highway.—See *Patterson v. Detroit, etc., R. Co.*, 19 Am. & Eng. R. R. Cas. 415; *Texas, etc., R. Co. v. Self*, 22 Ib. 310.

Railroads—Obstructing Highways.—Where the obstruction of a highway by a railroad company is an improper one, the community, through its proper officers alone, can complain. *Campbell v. Pennsylvania Schuylkill Valley R. Co. (Pa.)*, 11 Cent. Rep. 660.

Same—Damages Assessed by Views.—Where a jury of view, appointed to assess the damages to property sustained by reason of the construction of a railroad as contemplated by the declared plan of the company then being carried out, has assessed a sum and the same has been paid by the company, the owner of the land has no equity to compel the removal of an objectionable obstruction to a public highway; for every injury to his land, and to every right connected therewith, will be presumed to have been considered by the said jury. *Campbell v. Pennsylvania Schuylkill Valley R. Co. (Pa.)*, 11 Cent. Rep. 660.

The court say that "When the assessment of damages in this case was made, every injury to the appellants' land or to any and every right connected therewith, was or ought to have been considered; hence, we must take it that the damage done to their right of way in the public road was considered and disposed of. This leaves them without personal cause of complaint concerning the obstruction of the public highway; and if the community has such cause, its officers must be the ones to complain, and not private persons."

APPEAL OF TOWNSHIP OF NORTH MANHEIM.

(Pennsylvania Supreme Court, April 20, 1888.)

Highway Obstruction—Injunction—Pleading.—It is not necessary that a bill to enjoin an obstruction of a township public road should be instituted in the name of the commonwealth at the instance of the attorney-general, but such bill is maintainable in the name of the township.

Same—Township Supervisors—Powers.—Each of two Supervisors by whom a township is divided into two districts, for convenience in repairing roads, etc., has power of his own motion to maintain a bill in the name of the township to enjoin an obstruction to a public road in the district under his immediate control.

Railroads—Verbal Contract—Obstruction of Highway.—Neither one nor both of the supervisors of a township have power to make a verbal contract binding on the township, having for its object the substitution of a road for a way already open and in public use, nor to consent to an impediment or obstruction of a highway.

Same—Turnpike Crossing—Void Contract.—An agreement by the supervisors of a township that no objection will be made to the crossing of a turnpike by a railroad, provided the company will construct a new road so as to connect with a highway intersecting the turnpike further on, is an act requiring deliberation and judgment, and such agreement made by

a single supervisor without the concurrence of the other is void as against the township.

Same—Change of Turnpike—Reconstruction.—Pennsylvania act of February 19, 1849, sec. 13 (P. L. 84), providing that any railroad company finding it necessary to change the site of any portion of any turnpike shall cause the same to be reconstructed, etc., does not require such company to first longitudinally appropriate the road nor forbid a change of site where the appropriation consists of a grade crossing at an angle of forty-five degrees.

Same—Crossing—Duty of Company.—A railroad crossing so constructed as not to endanger the reasonable passage of persons and transportation of property, or as not to unnecessarily interfere with the public highway, is a substantial compliance with sec. 12 of the act of 1849 (P. L. 84), providing that whenever in the construction of such road it shall be necessary to cross or intersect any established road or way, it shall be the duty of the officers of the company so to construct the road across such established road or way as not to impede the passage or transportation of persons or property along the same.

Same—Crossing at Grade—Statutory Regulation.—A crossing at grade of a north and south turnpike at an angle of forty-five degrees, which crossing, including the track, is twelve feet eight inches high, the northern approach being two hundred feet long with an average rise of five and one half feet to the hundred, and the southern approach two hundred and forty-four feet with an average rise of seven feet to the hundred, both approaches being from nineteen to twenty feet in width, the nearest place being seventeen feet in width, is a substantial compliance with the foregoing act, although there is a cut to the west, and a traveller approaching the crossing cannot readily see or hear a train going east, where the company has also constructed at its own expense a new road starting near the beginning of the northern approach and connecting with the highway which intersects the turnpike to the south, the distance of the new road to the point of intersection being only one hundred yards farther than by the turnpike.

Same—Crossing above Grade—Action to Compel—Costs.—Where on the final hearing of a suit by a township to compel a railroad company, which was about to cross a turnpike at grade, to make the crossing above grade, it appeared that the grade crossing was properly and safely constructed, but it was shown that a new road constructed by the company at its own expense to connect with a highway intersecting the turnpike farther on was some three feet above the level of the adjoining country, and that a creek flowed along it for some distance, and between the hearing before the master and the final hearing the company had begun to operate its line, but the road had not been fenced, although a year had elapsed since the building of the connecting road had been commenced, the company will be required to pay costs upon the bill being dismissed, the fencing being necessary under the act of February 19, 1848, sec. 13 (P. L. 49), requiring the new road to be "forthwith constructed in as perfect a manner as the original road."

APPEAL from Court of Common Pleas, Schuylkill County.

Bill in equity by township of North Manheim, appellant, through David Shappell, one of its supervisors, for injunction. The facts appear from the report of the master, to whom the case was referred. The report is in part as follows:

"The bill in equity filed by complainant sets forth that for

more than twenty years past there has been a public township road open and in public use in North Manheim township, between Landingville and Focht's tavern; that said road was a good and level road, with a solid foundation, free from mud, and continually used by teams, carriages, and foot passengers, to and from Landingville, and by young children attending school; that the Reading & Pottsville R. Co., defendants, incorporated under the provisions of an act of assembly of this commonwealth, are engaged in constructing a railroad between Reading and Pottsville, which crosses or intersects said public road at an angle of about fifty degrees, and have constructed an embankment over and above said public road, the top of which embankment is twelve feet or more above the former level of said road, and have filled the bed of the same for a distance of about 150 feet on each side of the embankment, making the ascent on each side very steep, being eight feet or more in the hundred feet; that the unnecessary construction of the embankment and filling up the public road impedes the passage and transportation of persons and property, and renders the crossing dangerous to the safety and lives of the travelling public, and difficult for loaded teams, carrying freight to and from Landingville, for shipment over the Philadelphia & Reading R.; that the construction of the railroad by means of a cut through the side of the hill on a curve with a hill on the south side, and the barn and buildings of George Adams on the north side, of said railroad will conceal the approach and deaden the sound of engines, trains, and cars coming from the west, thereby constituting an additional very serious danger to the travelling public passing and repassing; that this impediment to the public travel could easily be avoided by the construction of a bridge or culvert over the public road, and that there is no physical hindrance to the building of a bridge or culvert, nor any reason or necessity for the omission to build either, and ask equitable relief as follows: (1) That the defendants, their servants, agents, and employees, be restrained by injunction from further filling up and obstructing the said township road, and thereby impeding the transportation of persons and property along the same; (2) that the defendants be required to remove the obstructions of earth and rock from the bed of said township road so as to render public travel as free, unimpeded, and safe as formerly; (3) that the defendants be compelled by a decree of the court to erect and maintain a proper bridge or culvert over said township road of a width not less than the width of the township road as now laid out and used. The defendants, in their answers filed, deny that by their agents, servants, and employees they are engaged in filling up and obstructing the township road, as stated in the

Master's report—Facts.

bill, in such a manner as to impede public travel, or to endanger the safety of the travelling public. They aver that the embankment was thirteen feet and eight tenths above what was the surface of the road, and the approaches do not exceed seven feet in the hundred feet at any place; that the ascent is easy and gradual, and does not impede the public travel, nor make it difficult for loaded teams, nor dangerous, if such caution is used as all prudent persons would use at such a crossing. They deny that a bridge or culvert over the road is either necessary or required by law, or that the reason for not constructing a bridge or culvert is the increased cost, and further deny the right of complainant to dictate to or interfere with them as to the manner of the construction of the railroad. They admit that they were notified by the supervisor of the township not to build the crossing as set forth in the bill. It appears in the evidence that the road in question leads from Landingville to the cross-roads at the hotel of Jeremiah Focht (Continental Hotel), and from thence to the centre turnpike, the whole distance through North Manheim township. That it is a public road, open and used by the public for more than twenty-five years, and is nearly level. From the point where the embankment crosses it southwardly towards Landingville it passes along the base or foot of a steep hill on the west side. The road-bed is on a solid gravel and rock foundation, comparatively free from mud, and easily kept in repair. The road is in general use by the farmers and others in the vicinity for the transportation of freight and merchandise to and from the Philadelphia and Reading railroad station and canal landings at Landingville, by children attending school, and by the public generally. A passenger coach between Orwigsburg and Landingville frequently passes along this road instead of the more direct road. The defendants have constructed a high embankment for their railroad across a ravine or narrow valley from Scallop's hill on the east to the hill on the west at the crossing in question. Immediately on the west side of the crossing a cut or excavation is made through the descending slope of a steep hill on the south. The embankment is constructed across the road at an angle of about 45 degrees, with a slight curve to the south. The distance across the valley traversed by the embankment is 450 yards, or thereabout. At the foot of Scallop hill the railroad company have constructed a culvert or archway over the east branch of Mohannon creek. Westwardly about 100 yards they have constructed an archway over the direct road from Orwigsburg to Landingville. The embankment at the crossing is 11 feet 4 inches from the surface of the road-bed to the bottom of the ballast, and when completed and the track laid will be 12 feet 8 inches above the bed of the road, as testified to by the chief en-

gineer. The length of the approach on the north side is 200 feet to the top of the embankment, with an average ascending grade of $5\frac{1}{2}$ feet in the hundred feet. The length of the approach on the south side is 244 feet, with an average ascending grade of 7 feet in the hundred, the steepest grade being 9 feet in the hundred; but by extending the approach 80 feet could be reduced to an average grade of $5\frac{1}{2}$ feet to the hundred. The average filling on either side is nearly 20 feet, the narrowest points being from 16 to 17 feet wide. The road before the filling was of the uniform width of 33 feet. The respondents have constructed a road for public use as a substitute for the road in question, beginning at the northern approach to the embankment crossing, then extending parallel to and 75 feet from the embankment until it intersects the Orwigsburg road, north of and near the archway over the same. Inasmuch as the highway is not occupied, was not in a line, or interfered with in any way by the construction of the railroad, except by crossing the same, it cannot be regarded as a change of the site of the road within the purview of the thirteenth section of the acts of 19th February, 1849, which provides that 'if any railroad company shall find it necessary to change the site of any portion of any public road, they shall cause the same to be reconstructed forthwith, at their own expense, on the most favorable location, and in as perfect manner as the original road.' Nor is it now claimed by the solicitor for the defendants that the road so constructed by them was made with the view of changing the site of the road, but to furnish to the public a substantial, level road through the archway over the Orwigsburg road, which they could use at their pleasure, and to avoid the expense of the construction of a bridge or archway at the crossing so near the archway over the Orwigsburg road, the two roads being nearly parallel at that point, and distant from the other 325 yards. . . .

"Two questions are presented: (1) Can this proceeding be maintained in its present form? (2) Is the crossing over the public road constructed in the manner required by law? In support of the first proposition the respondents cite the following authorities: *O'Brien v. Railroad Co.*, 2 Amer. Ry. Cas. 90; 2 Redf. R. R. 409; *Bigelow v. Bridge Co.*, 14 Conn. 565; *Higbee v. Railroad Co.*, 19 N. J. Eq. 276; *Hinchman v. Railroad Co.* 17 N. J. Eq. 75; *Georgetown v. Canal Co.*, 12 Pet. 98; *Mechling v. Bridge Co.*, 1 Grant, Cas. 416; *Com. v. Rush*, 14 Pa. St. 186; *Johnston v. Railroad Co.*, 10 R. I. 365. On the same point the complainant cites 2 *Purd. Dig.* 1278, pl. 43; *Id.* 1401, pl. 12; *City of Philadelphia v. Friday*, 6 Phila. 275; *City of Philadelphia v. Railway Co.*, 8 Phila. 648; *City of Philadelphia v. Railroad Co.*, 3 Grant, Cas. 403; *Commissioners v. Long*, 1 Pars. Eq.

Questions presented and authorities cited.

Cas. 143; Hacke's Appeal, 101 Pa. St. 245; Edge *v.* Com., 7 Pa. St. 275. The jurisdiction of courts of equity in cases of purpresture and nuisances is placed beyond dispute by the settled law of England and of the several states, including the state of Pennsylvania. It arises from their ability to give a more complete and perfect remedy than is obtainable at law in order to prevent an irreparable injury to individuals or to the public, and also to suppress oppressive and vexatious litigation. They can interpose when courts of law cannot, to restrain and prevent such nuisances which are threatened or in progress, as well as abate those already existing. The exercise of the power to restrain encroachments on rights and easements which are held for the use and benefit of the public, is often the only efficient mode of defending the general as well as the special interest of the citizens in highways and other public accommodations, and to prevent the invasion and destruction of those rights. 2 Story, Eq. Jur. § 924; Commissioners *v.* Long, 1 Pars. Eq. Cas. 143; Com. *v.* Railroad Co., 24 Pa. St. 159. In Hacke's Appeal, 101 Pa. St. 245, Justice Trunkey says: 'It has long been settled that nuisances to rights of way are one of the classes of cases in which the equitable remedy by injunction may be sought. This was established in England and accepted as a rule in this country. No case has been cited where it has been doubted or denied.' A broad distinction is made as to acts that are injurious to the public and those that are especially injurious to individuals. Private citizens have no right of action either in law or equity for the suppression of a public nuisance unless they aver and prove some especial damage to themselves, or a particular injury distinct from that which they suffer in common with the rest of the public. For a nuisance that is merely a public wrong, only a public action may be brought, and that must be done by the proper public functionaries. Mechling *v.* Bridge Co., 1 Grant, Cas. 416; O'Brien *v.* Railroad Co., 2 Conn. R. Cas. 90; Bigelow *v.* Bridge Co., 14 Conn. 565; Higbee *v.* Railroad Co., 19 N. J. Eq. 276; Georgetown *v.* Canal Co., 12 Pet. 98. It is undoubtedly true that in cases of public nuisances or public wrongs the proceedings are generally instituted in the name of the commonwealth, at the instance of the attorney-general; but are there not other public functionaries representing the public, within the meaning of the supreme court in the case of Mechling *v.* Bridge Co., who may maintain a suit in such cases? No better argument can be presented than is furnished in the elaborate opinion of Judge King, the able jurist, in the case of Commissioners *v.* Long, 1 Pars. Eq. Cas. 143, and the authorities cited by him. . . . The case of Commissioners *v.*

Equity jurisdiction in cases of purpresture and nuisances.

Who may maintain suit in case of public nuisances and wrongs.

Long was followed by the case of *City of Philadelphia v. Friday*, 6 Phila. 275, which was an application for a special injunction to restrain the defendant from erecting a building partly on Second street in said city. One of the points of defence was that the commonwealth was a necessary party. In remarking upon the objection, Brewster, J., says: 'In England, bills similar to the present have been entertained and relief granted upon the complaint both of municipal corporations and of individuals;' citing *Mayor v. Bolt*, 5 Ves. 129; *Sampson v. Smith*, 8 Sim. 272, and other cases. 'The same ruling has obtained in the United States;' citing *Trustees v. Cowen*, 4 Paige, 510, and *Hart v. Mayor*, 9 Wend. 571, and our Pennsylvania cases (*Commissioners v. Long*, 1 Pars. Eq. Cas. 143, and *Borough of Frankford v. Lennig*, 2 Phila. 403); and adds: 'The right of the city and her citizens to restrain nuisance on public highways has been frequently sustained,—in cases against *Clark v. Railroad Co.*, 3 Phila. 259; *Philadelphia v. Railroad Co.*, 3 Grant Cas. 403.' Remarking upon the latter, the judge says: 'The language of Woodward, J., is so forcible and directly to the point as to settle the question if he stood unsustained by any other authority. He says the most obvious purposes for which the city was chartered was the police of the streets. To preserve and maintain them as public highways, the power of taxation was conferred upon the municipality, and it has been largely exercised. Every propertyholder has a direct and vested interest in the maintenance of the municipal authority over the streets.' In *City of Philadelphia v. Railway Co.*, 8 Phila. 648, an injunction was applied for to restrain the construction of defendant's railway on Broad street. Allison, P.J., uses the following language: 'After the repeated instances in which the court has interfered in cases of this kind, at the instance of the city, the question ought to be considered at rest, even though there is no complaint of injury to the immediate property of the corporation, but where the wrong is done to the citizens of the municipality, and of the commonwealth generally. Over the streets of the city they exercise control as supervisors of the highways, which makes it obligatory upon them to see that the streets are kept open for public travel, free from all unlawful obstructions. And this obligation carries with it the responsibility of the city for loss or injury sustained by the citizens by reason of neglect or improper performance of their duty, if it does no more, and subjects the individual members of council to indictment and punishment. It would seem to follow that, where an encroachment is about to be made on one of the highways, it should possess the right to prosecute and defend the public interests, in the courts of the commonwealth.'

"The decisions in the above cases seem to have been acquiesced in, and may now be regarded as establishing the right of the corporate authorities of a city or municipality to prosecute a bill in equity in cases of nuisances, in public highways, injuriously affecting the citizens of the municipality, and of the commonwealth generally. The principal ground upon which the decisions are founded is the power given to the local authorities over the streets, their duty to maintain and preserve them as public highways, which makes it obligatory upon them to see that the highways are kept open for public travel, free from all unlawful impediments and obstructions, and the liability of the municipality for loss or injury sustained by reason of a neglect or improper performance of this duty. The acts of assembly declare that the supervisors of each township shall perform the duties of supervisors of the public roads or highways, and impose upon them the duty to 'effectually open and constantly keep the same in repair, and that they shall at all seasons be kept clear, of all impediments to easy and convenient passing and travelling, at the expense of the respective townships.' It being thus obligatory upon the supervisor to see that the public highways are kept open and clear of all impediments to easy and convenient travel, and, for neglect of duty in this respect, renders them liable to indictment and punishment, and, for any loss or injury sustained by reason of such neglect, holds the township responsible in damages; it is fitting and proper that a township, as a *quasi* municipal corporation, having capacity, as a body corporate, to sue and be sued in its corporate name, should have an equal right with the corporate authorities of a city to proceed by bill in equity and injunction when the public interests of the citizens submitted to their charge and control are invaded. In *Commissioners v. Long, supra*, the court of common pleas sustained the right of the township authorities to proceed by bill in equity. The master arrives at the conclusion of law that the bill can be sustained in the name of the township authority.

Corporate authorities of municipality may maintain bill.

"Is the defendant's railway constructed across the public highway in the manner required by law? The act of assembly of April 4, 1868, under which the defendant's railroad company is incorporated, provides that the corporation shall be entitled to exercise all the rights, powers, and privileges, and be subject to all the restrictions and liabilities, of the act regulating railroad companies approved the 19th of February, 1849, and the several supplements thereto. The 12th section of said act (2 *Purd. Dig.* 1220) provides that 'Whenever, in the construction of such road or roads, it shall be necessary to cross or intersect

Whether crossing is constructed as required by law.

any established road or highway, it shall be the duty of the president and directors of said company so to construct the said railroad across such established road or way as not to impede the passage or transportation of persons or property along the same.' A railway company may construct its railway across any established road or way whenever it may be necessary to cross or intersect it; but it must so construct it that it will not impede the passage or transportation of persons or property over said road or way. If it so constructs its railway as to be a serious inconvenience and dangerous obstruction to travel along the way or road, it may be indicted therefor. *Railway Co. v. Com.*, 90 Pa. St. 300; *Richards v. Railroad Co.*, 45 N. Y. 846; *Swenk v. Railroad Co.*, 2 Chester Co. Rep. 177. In *Com. v. Railroad Co.*, 27 Pa. St. 371, Lewis, J., says: 'The duty to do as little damage to the common highway as possible, consistent with the fair uses of the railroad, carries with it the power to do such acts as are absolutely necessary to avoid such damage. If the common road can be crossed at grade, the body of it must be so altered and constructed as to make the crossing as convenient as possible for wagons, carriages, etc. If the railroad crosses at an elevation too great for this, the common road may be raised to a reasonable degree by embankment and a bridge substituted for the road, as it may be depressed so as to admit of a passage under the railroad.' When, therefore, a railroad has a right to cross a highway or run in proximity to it, but in doing so is bound to so use its privilege as not necessarily to interfere with the public highway, it must be allowed to create such impediment as cannot be avoided; but those which are not absolutely necessary to the making and using of the railroad are unlawful. It makes no difference whether the road is a main thoroughfare or an unimportant one—the law protects all alike. *Com. v. Railroad Co.*, *supra*.

"Have the defendants complied with the law in this respect? The evidence develops the fact the defendants have constructed an embankment across the public road at an elevation of from 10 feet to 10 feet 4 inches above the bed of the road, and, when completed and the tracks laid, will be 12 feet 8 inches above. To overcome this elevation, they have filled up approaches on both sides: on the north side 200 feet in length, with an average grade of $5\frac{1}{2}$ feet in the hundred feet, the steepest grade being 7 and 4-10 feet per hundred; on the south side the approach is 200 feet or more in length, with an average grade of 7 feet per hundred, the steepest grade in 50 feet being 9 feet per hundred. By extending the approach 80 feet, the average grade could be reduced to $5\frac{1}{2}$ feet per hundred feet. The width of the approach is nearly 20 feet, the narrowest point being 16 to 17 feet wide. The embankment crosses

the highway on a slight curve at an angle of about 45 degrees. Immediately after the crossing the highway to the west a cut is made through the lower part of a steep hill, on the south side inclining towards the excavation or cut. The road from Landingville passing along the easterly steep side of the same hill to the top of the embankment will make it impossible to see an approaching train from the west until the traveller from the south side reaches the crossing, by reason of the intervening point of the hill; and for the same reason it will be difficult to hear the sound of the approaching train, or to determine its distance from the crossing. The barn and building of George Adams on the north side of the cut also partially obstructs the view of a train from the same direction. It is conceded that the crossing under these circumstances will imperil the safety and lives of the travelling public without a flagman; but even with a flagman, when one considers the height of the embankment, the comparatively steep and narrow approaches, the obstruction to the view of approaching trains, the danger of collision by the crossing at grade, the possible neglect of the flagman, and the delay and difficulty of the ascent to the embankment by heavily loaded teams, particularly in winter, over an icy surface, it certainly impedes the passage and transportation of persons and property, and imperils the safety of the public to an extent not authorized by law, especially so when these impediments, inconveniences, and dangers may be easily avoided by a crossing over the public road by means of a bridge or archway with perfect safety and without disturbing in the least the road-bed. That there is sufficient elevation for an overgrade crossing is not denied. The chief engineer, Mr. Brendlinger, assigns three reasons for not building a bridge: (1) The expense. (2) That a bridge causes a gap in a railroad, and is not considered solid. (3) That while the road was being filled in he was called on by Mr. Shappell, the supervisor, and his counsel. They complained of the filling, and stated that the railroad company had no right to impede public travel. Mr. Brendlinger replied that he would provide a road for travel until a new road was built equally as good; that he could not take a road without replacing it with another equally as good; and that he proposed making a road on the location on which the new road has since been built. They expressed their satisfaction, and left with the understanding that if the new road was made there would be no objection to having the old road filled up and crossed at grade. Consequently the respondents constructed a road for public use, a level road from Adams' barn to the Orwigsburg road, thence through the archway over the same to Landingville, which can be used by the public, instead of the road over the crossing, and having incurred the expense of the archway over the Orwigsburg

road, it would be an unnecessary expense to construct a bridge at the crossing so near the archway, the distance being 335 yards. That such a verbal agreement or understanding was had is denied by Mr. Shappell; but, assuming the facts to be as represented, such a contract is an act requiring deliberation and judgment, and therefore the act of a single supervisor without the concurrence of the other supervisor is void as against the township. *Cooper v. Lampeter Tp.*, 8 Watts, 125. See notes to 2 *Purd. Dig.* 1278. Neither one or both of the supervisors can make any contract binding upon the township or the public having for its object the substitution of a road for one opened and in public use, or consent to an impediment or obstruction of a highway in the township. The evidence shows that a bridge can be built for a single track, which the embankment calls for, at a cost of between \$4000 and \$5000, and for a double track between \$5000 and \$6000. In *Railway Co. v. Com.*, *supra*, the construction of a mound two feet high on one side of the railroad track, and four feet on the other side, on a descending grade, was held to be a serious inconvenience and dangerous obstruction to travel, and the maintenance of it a nuisance. Justice Mercur says: "It is no sufficient answer to the wrong committed to prove that it would require the expenditure of from \$5000 to \$8000 to so lower the bed of the road as to allow it to pass under the railroad. The sum is not so great as to absolve the railroad company from its duty to so make the crossing that it shall not endanger the reasonable passage of persons and the transportation of property over the road." The ruling of Judge Mercur will apply with great force to the present case, where the embankment is much higher and the danger more obvious. See also *Railroad Co.'s Appeal*, 93 Pa. St. 150. Although the respondents have made a new road for public use, which may be travelled over by the public, instead of the road over the crossing, yet, so long as the highway remains open, in public use, and not vacated in the manner required by law, the public have a right to pass over it free from serious inconvenience or unlawful impediment. . . ."

The master reported the following decree: "(1) That the defendant be enjoined and directed to remove all obstructions of earth and rock complained of in said bill from the bed of the public road described therein, so as to render public travel upon said road as free, unimpeded, and safe as formerly; (2) that the defendants be enjoined and directed to erect and maintain a proper bridge or archway over said public road." The defendant excepted thereto, and the court, after argument on exceptions, delivered the following opinion:

"The defendant denies the right of the plaintiff to maintain

this action, and alleges that the commonwealth, at the instance of the attorney-general, is the proper party. The master has considered this subject at considerable length, and cited numerous authorities to sustain the conclusion at which he arrived. He resolved the question in favor of the plaintiff, and determined that the township may sustain a proceeding in equity against the defendant to prevent, by injunction, the erection and maintaining of a public nuisance in its highway without the intervention of the attorney-general. We will not stop to review these authorities, but, for the purposes of this case, accept his conclusion upon this subject as correct. We may, however, direct attention to the fact that this proceeding seems to have been instituted by David Shappell, who is but one of the supervisors. North Manheim township has two supervisors, who, for the purpose of repairing the roads, bridges, etc., have divided the township into two districts. While the township may sustain this action, it may be questioned whether one supervisor can, without the consent of the other, institute and conduct legal proceedings in the name of the township. The defendant, at the time of the argument, contended he cannot. The ordinary repair of roads and bridges, and opening roads, authorized by the court of quarter sessions, are ministerial duties, and may be performed by one supervisor. Hence it was ruled in *Hopewell v. Putt*, 2 Wkly. Notes Cas. 46, that where one supervisor awarded a contract for building a new road, a person who paid money on the contract at the request of the supervisor could recover the same from the township. One supervisor cannot, however, levy a tax to pay the debts contracted and expenses incurred in the township. The consent of both is required, because it is a deliberative and not a ministerial duty. *Cooper v. Lampeter Tp.*, 8 Watts, 125. In *Union Tp. v. Gibboney*, 94 Pa. St. 537, Justice Trunkey reviews our authorities upon this subject, and discusses the power of supervisors. From this decision we gather that the general rule is that "one supervisor cannot bind the township for the performance of a contract, the propriety of entering into which is the subject of deliberation and the exercise of judgment; but he may in matter purely ministerial. When the business requires deliberation, consultation, and judgment, all should be consulted, because the advice and opinions of all may be useful, and though they do not unite in opinion a majority may act when there are more than two." In *Somerset Tp. v. Parson*, 105 Pa. St. 360, we have an illustration of what is meant by ministerial and deliberative duties. There were four supervisors in the township. They met, laid the road tax, and fixed the wages to be allowed for all hands, teams, and plow, and agreed

Opinion of
court.

Institution of
proceedings by
one supervisor.

to be responsible if the plow was broken. As to the damage to the plow the undertaking of the supervisor was held to be 'outside and beyond the ministerial power delegated to him.' As to the hire of the man, team, and plow it was said: 'It is in the line of his ministerial duty to open or repair a road, and he can therefore employ laborers for that purpose.' Is the institution of legal proceedings such an act, the propriety of which requires deliberation and the exercise of judgment? If so, it is beyond the power of one supervisor. Since, however, this proceeding was instituted to remove an alleged obstruction to one of the roads under the care of Mr. Shappell, we will resolve any doubt upon this subject in favor of the plaintiff. The defendant is a corporation duly incorporated under the provisions of the act of February 19, 1849. The twelfth section of the act of 1849 (P. L. 84) contains this language: 'Whenever, in the construction of

Construction of crossing as required by law. such road or roads, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the president and directors of the said company so to construct the said road across such established road or way as not to impede the passage or transportation of persons or property along the same.' There can be no doubt of the right of the defendant to cross or intersect a public highway under the provision of the act, either at grade, above or below grade. See *Struthers v. Railway Co.*, 87 Pa. St. 282; *Com. v. Railroad Co.*, 27 Pa. St. 354, 371; and *Railroad Co.'s Appeal*, 18 Wkly Notes Cas. 421. It becomes important to determine how the language, 'so as not to impede the passage or transportation of person or property along the same,' shall be understood. The word 'impede' is almost synonymous with the word 'obstruct,' except that it is seldom, if ever, used to signify an entire blocking up of the way. It is an obstacle, not an impassable barrier. To understand this word in this way, and say that a grade crossing must be of such a character as not to be an obstacle in the way, or an obstruction to the passage or transportation of person or property, is to prohibit grade crossings entirely. In the railway laws of Massachusetts it is provided that crossings shall be constructed so as not to obstruct a turnpike or road. In *Spear v. Cummings*, 23 Pick. 226, it was held to mean that they should be built so as to cause the least possible inconvenience or impediment. By a statute of this commonwealth owners of lands adjoining navigable streams were permitted to build dams, provided they did not obstruct or impede navigation or prevent fish from passing up the stream. In *Bacon v. Arthur*, 4 Watts, 440, our supreme court held that if these words were taken literally, the owners could not avail themselves of the privilege at all; but as this construction would have been contrary to the grant itself, a more liberal one was

adopted, and a dam that did not materially hinder was held to be all that was required. In *Com. v. Railroad Co.*, *supra*, the words 'impede,' 'obstruct,' and 'hinder' were considered and construed by Black, C. J., and Lewis, J., to mean, so as not to unnecessarily interfere with the public highway. Accepting these decisions as authorities upon this subject, we conclude that where a crossing is so constructed as not to endanger the reasonable passage of persons and transportation of property, or as not to unnecessarily interfere with the public highway, it is a substantial compliance with the twelfth section of the act of 1849. The crossing in question, including the track, is 12 feet and 8 inches high. The northern approach is 200 ft. long, and of the average rise of $5\frac{1}{2}$ feet to the hundred. The southern approach is 244 feet long and of the average rise of 7 feet to the hundred. The approaches are from 19 to 20 feet wide, and in the narrowest place about 17 feet. In addition to this the master says that as the railroad enters a cut going west, a traveller approaching from the south cannot see the approaching train from the west until he is close to it, and for the same reason cannot so well hear its approach. He finds that without a flagman this crossing would be dangerous, and that if a flagman were placed there he might possibly be negligent in the discharge of his duty. If this crossing requires a flagman it is the duty of the defendant to put one there, and we cannot presume that this duty will not be performed, or that the flagman, when put there, will be negligent, and then consider these presumptions in determining this controversy.

"There is, however, another matter to be considered in connection with the character of this crossing. The master finds as a fact, and there is no controversy upon this subject, that the railroad company built a level road from Adams' barn to the Orwigsburg road, a distance of 335 yards. The Orwigsburg road leads through an archway, and passes on to Landingville. That this new road does not increase the distance to any given point more than 100 yards, is substantially built on good foundations, with a top dressing of from 6 inches to 2 feet of broken stone and earth. This road is of the average width of 21 feet, and of the average distance of 75 feet away from the railroad. The defendant's engineers testified that this road was built in pursuance of an understanding with Mr. Shappell that if the company provided this new road there would be no objection to having the old road filled up and crossed at grade. Mr. Shappell denied this; but the master assumes the fact to be as represented, and concludes that such an agreement, made by one supervisor, would be void as against the township, because it is an act requiring deliberation and judgment. We agree with this conclusion, and think we could safely go further and say that

both the supervisors could not by their agreement vacate or change the location of any of the public roads of the township. But it is not a question of the power of the supervisors to change this road, but whether the legislature has conferred upon the defendant the power to do so. The thirteenth section of the act of 1849 is in this language: 'If any such railroad company shall find it necessary to change the site of any portion of any turnpike or public road, they shall cause the same to be reconstructed forthwith, at their own proper expense, on the most favorable location, and in as perfect a manner as the original road.' Then follows a provision securing parties any damages they may suffer by the change. Our present learned chief justice, in speaking of this section of the act of 1849, says: 'It is an unconditional power to a railroad company to construct its railroad upon a public road, but commands what the company shall thereupon do. The legislature authorizes the original highway to be changed to another form of highway. The act of 1849 gives to all railroad corporations, subject to its provisions, the right to take possession of such portions of any public road as come within the line of its tracks.' To the commonwealth belongs the franchise of every highway within its limits, as a trustee of the public. Every public road therein exists by force only of the commonwealth's authority. So every railroad has its franchise by grant from the state. See *Railroad Co. v. Com.*, 73 Pa. St. 37. In *Parke's Appeal*, 64 Pa. St. 137, Thompson, C. J., says: 'Neither the court below nor this court have any right to interfere with the location made by the company on the score of preference, if any be felt. Our only question is whether it has or has not exceeded a discretion on the subject apparent on the face of the act of incorporation. Now mark the language of the act: "If any such railroad company shall find it necessary to change the site of any portion of any turnpike or public road." There is nothing in this that requires that the company should first longitudinally appropriate the road in order to acquire the right to change its site. Now, is there anything in the section to forbid the company changing the site of the road when the appropriation consists of a grade crossing at an angle of forty-five degrees. It is therefore difficult to understand how we could give such construction to this language as would authorize a railway company to exercise the power it confers, only upon condition that its track was placed lengthwise upon some part of the public highway. But should this be regarded as doubtful, still the fact remains that the presence of this new road affords to every traveller, whether on foot or by vehicle, an opportunity to decide for himself whether he will make the ascent and cross the track at grade, or whether he shall journey 100 yards farther, under

through the archway, upon a practically level road, and thus avoid entirely both the ascent and grade crossing. Under these circumstances, the master recommends that we shall enjoin the defendant and direct the removal of the embankment which was there when the bill was filed; and, second, that we direct the defendant to erect and maintain a proper bridge or archway over said public road. Without further discussion, we may say, every member of the court has examined this subject, and we are unanimous in the conclusion that this decree should not be entered. We are, however, not prepared to dismiss the complainant's bill at this time. At the time of the hearing before the master, the new road was not completed, but the defendant was engaged in putting on the top dressing of stone, etc. The report shows that it was then contemplated that this road should be, in part at least, fenced. The above dressing has been completed, but the fencing has, in point of fact, been entirely neglected. The channel of the east branch of the Mohannon creek has been changed by the defendant, and the creek now flows along the northern side of the new road for some distance. The embankment of the new road is, at some places, as much as three feet above the level of the adjoining territory. The supervisor testified that this road should be fenced upon both sides, and the master regards proper fencing of portions of it as a necessity. The act commands that in case the site of a road shall be changed, the new road shall be constructed forthwith "on the most favorable location and in as perfect a manner as the original road." It is but proper that the provision of the act should be fully observed in the construction of the new road. These considerations lead us to believe that proper fencing of the substituted road would be but a reasonable precaution, and really necessary to make it, in the language of the act, "in as perfect a manner as the original road." In view of the fact that more than a year has elapsed since the defendant began the construction of this new road, and its railroad is now being operated by them, and that no attempt has yet been made to fence any part thereof, although fencing, to a certain extent at least, would seem to be necessary according to the testimony of both sides,—it seems but proper that the defendant should pay the costs. And now, January 3, 1887, it is ordered that upon the defendant's properly fencing the substituted road in question, within a reasonable time, and paying the costs, the complainant's bill shall be re-regarded or dismissed."

Plaintiff thereupon took his appeal.

W. F. Shepherd and *G. H. Gerber* for appellant.

Guy E. Farquhar for appellee.

PER CURIAM.—The carefully considered opinion of the court

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below relieves us from the necessity of an extended review of either the facts involved or the law governing the subject-matter in controversy. The appeal is dismissed, and the decree affirmed, at costs of appellant.

Injunction to Restrain Obstructions of Streets and Highways by Construction of Railroads.—See, *ante*, Dodge *v.* Pennsylvania R. Co., 180, and note.

Duty of Company to Restore Highway as Not to Impede Travel at Crossing.—See Evansville, etc., R. Co. *v.* Carvener, 32 Am. & Eng. R. R. Cas. 134, and cases from this series cited in note, p. 136.

BOARD OF COMMISSIONERS *et al.*

v.

STATE *ex rel.* COTTINGHAM *et al.*

(Indiana Supreme Court, July 10, 1888.)

Railroad Companies—Municipal Aid—Not a Donation.—Under the statutes of Indiana, the mere fact that the inhabitants of a township have subscribed to stock in aid of the construction of a railway does not entitle the company to demand the money subscribed, as a donation; but the taxpayers have a right to determine, by their petition and their votes, whether the aid voted shall be by way of taking stock in the company or by way of donation.

Same—Subscription to Stock—How Made.—Under the act of 1869 (Acts Sp. Sess. 1869, p. 92) relating to the subscription by the inhabitants of a township in aid of the construction of a railway, providing that "Said board of commissioners may, after the assessment herein provided for, or any part thereof, shall have been collected, take stock in such railroad company from time to time, in the name of the proper township, and pay therefor when the same is taken out, the money to be collected as aforesaid," etc., the simple voting of the aid by the township is not a subscription to the stock; but the subscription is to be made by the county board, which for that purpose acts as the agent of the township; and until they execute that power and authority, there is no perfected subscription.

Same—Foreclosure—Rights of Purchasers—Release of Unpaid Subscriptions.—Indiana Rev. Stat. of 1881, sec. 3945 *et seq.*, entitled "An act to authorize, etc., the sale of railroads to enable purchasers of the same to form corporations, and to exercise corporate powers," etc., providing that, in a case of a foreclosure sale of any railroad, etc., the purchaser may form a corporation with power to operate the road; section 3947 of which statute provides, in substance, that such purchasing corporation shall possess all the powers, rights, etc., which were possessed by the vendor company, and shall have power, at any time after the formation of the corporation as aforesaid, to assume any debts and liabilities of the former corporation, and to make such adjustment and settlement with any stockholder or creditor as may be deemed expedient, provided that all subscribers to the original stock shall be released and discharged from all their unpaid subscriptions which shall not have been previously settled or arranged by agreement or

compromise, etc.,—was intended to protect subscribers by cancelling all obligations to pay unpaid subscriptions to such stock in all cases where there shall not have been an adjustment by agreement or compromise.

Same—Protection of Subscribers—Statutory Construction.—That act was not intended to subserve any mere temporary purposes, its terms being general, and applicable to all purposes arising subsequently to its passage. The proviso protects all subscribers to stock in railway companies, although at the time of its passage there was no law authorizing municipal corporations to vote aid and become stockholders in railway companies.

Same—Municipal Subscription to Stock—Design of Statute.—The Indiana statute authorizing townships to aid railway companies by way of taking stock therein contemplates that the township, by being a stockholder, may have such an interest in the property of the corporation as shares of stock usually represent, and such an influence in the management of its affairs as any other holder of a like amount of stock usually has.

Same—Unjust Subscription—Sale Cuts off Rights.—The act of 1865 (Ind. Rev. Stat. 1881) was enacted upon the theory that, where a railway company no longer own the railroad by reason of a judicial sale as provided in that act, an unpaid subscription to its stock ought not to be coerced for the reason that the subscribers cannot acquire an interest in the railway nor have a voice in its management.

Same—Failure to Pay Subscription—Mandamus by Purchaser.—Mandamus does not lie in favor of a railway company purchasing, at foreclosure sale, the capital stock of an insolvent railway company to which the people of the township had voted aid, to compel the levy and collection of a tax for the purpose of paying them the amount voted in aid of the original company.

APPEAL from Circuit Court, Hamilton County; on petition for rehearing.

Elmer Cottingham and the Midland R. Co., as relators, filed their complaint against the board of commissioners of Hamilton county and James W. Crooks, as the auditor of that county, asking that, by a writ of mandate, said Crooks be compelled to place the amount of an appropriation voted in aid of the Anderson, Lebanon & St. Louis R. Co., whose successor the Midland R. Co. was, upon the tax duplicate for collection, and that the county board should be compelled to make an order for its collection. An alternative writ of mandate having been served, and a demurrer thereto sustained, a peremptory writ ordered.

Defendant's appeal.

Shirts, Shirts & Fertig for appellants.

Kane & Davis and *Henry Crawford* for appellees.

ZOLLARS, J.—Counsel for appellee contend, with vigor and ability, that in this state, as elsewhere, there is no difference between an appropriation by a municipality by way of a donation and by way of taking stock in the railway company to which aid is voted. That our statutes clearly recognize and create such a distinction is, in our judgment, so plain as to leave no reasonable ground for controversy. The first section of the act of

Distinction between donation by municipality and subscription to stock.

1869 (Acts Sp. Sess. 1869, p. 92 *et seq.*), as stated in the principal opinion, provided that, when a petition was presented to the county board asking that a township should make an appropriation by taking stock in or donating money to a railway company, etc., it should be the duty of the board, etc. The fourteenth section of the act provided that, after any part of the assessment should be collected, the board of commissioners might take stock in the railway company from time to time, in the name of the proper township, and pay therefor when the same was taken, etc. The title of the act was "An act to authorize aid to the construction of railroads, by counties and townships taking stock in and making donations to railroad companies." Section 1 of the Act of 1872, which seems to be in force yet (Rev. St. 1881, § 4065), provides, that in all cases where a township tax has been levied and collected under the act of 1869, which authorizes townships, by taking stock in or making donations to railway companies, to aid in their construction, and the right to tax has been forfeited, the money shall revert, etc. Another act of 1872 (Rev. St. 1881, § 4070) had relation solely to stock in railroad companies issued for aid voted by counties and townships. Section 6 of the act (section 4075, Rev. St. 1881) clothes the township trustee with authority to vote the stock, held by the township, in all meetings of the stockholders of the railway companies by which the stock may be issued. And still another act of 1872 (Acts Sp. Sess. 1872, p. 49; Rev. St. 1881, § 4077 *et seq.*) has relation alone to stock in railroad companies issued for aid voted by municipalities. The title of the act of 1873 was "An act supplemental to an act to authorize aid . . . by townships taking stock in and making donations to railroad companies," etc. Acts 1873, p. 184. The first section of the act provides (Rev. St. 1881, § 4068) that no tax shall be placed upon the duplicate of any county for the purpose of taking stock or making donations to railroad companies, etc., until the railroad shall be permanently located in the township, etc. The second section of the act provided that, where stock was taken or donations made by any township, the collection of the tax should be suspended until the railway company had expended in the township, in the construction of its road, an amount equal to the amount of money to be donated or stock taken. The same distinction between taking stock in and making donations to railway companies by municipalities is made in the amendatory act of 1875. Acts 1874, p. 121; Rev. St. 1881, § 4069. And so in the act of 1877. Acts Reg. Sess. 1877, p. 111. The act of 1879 also provided that townships might vote aid to railway companies by taking stock in and donating money to such companies, etc. Acts 1879, p. 46. Section 3 of the act provides that no township which shall become the owner or

holder of any stock in any railroad company shall become liable for any debt or claim for work, labor, or material incurred in the building of the road, etc. Rev. St. 1881, § 4064. We have thus extended our references to the several and various statutes, not for the purpose of placing a construction upon them generally, nor of determining which or what portion of each is now in force, but for the purpose of showing, by quoting some of the language of each, in substance, that they all not only very clearly recognize, but as clearly establish, a difference between aid to railway companies by municipalities by way of taking stock and by way of donation. To say that they do not recognize and establish such a distinction would be to convict the legislature of the most useless and meaningless tautology.

Our cases have always recognized and enforced the distinction thus established by the statutes. For example, in the case of *Faris v. Reynolds*, 70 Ind. 359, cited in the principal opinion, the petition by the tax-payers to the county board was that a tax might be levied upon the property of the township to be collected and invested in the stock of the railway company. It was held that under the statutes the tax-payers of the township might determine by their petition and by their votes whether the aid voted should be by way of taking stock in the railway company or by way of donation. Among other things it was said: "The people of a township who vote this tax upon themselves should have the right, and, as we think, have the right, under the law, to determine by their vote the manner in which the money shall be used, whether by donation of the money or by taking stock in the company." In the case of *Bittinger v. Bell*, 65 Ind. 445 (458), cited in the principal opinion, the difference between aid to a railway company by way of a donation and by way of taking stock therein is fully recognized and asserted. And so, in the case of *Railway Co. v. City of Attica*, 56 Ind. 476, which arose under a statute similar to those involved here, so far as concerns the point under discussion, it was held that there is a clear and material difference between aid to railway companies by municipalities by way of a donation and by way of taking stock in such company. In the case of *Board, etc., v. Railway Co.*, 89 Ind. 101, it was held that the difference between an appropriation to a railway company under the statute above referred to, by way of a donation and by way of taking stock, is so marked that section 18 of the act of 1869, providing for a forfeiture of the right to an appropriation voted, applied only to donations, and not to cases where the appropriation was by way of taking stock in the company. We held in the principal opinion that the people to be taxed have a right to determine in advance by their petition to the county board and by their votes, that

Same—Authorities recognizing distinction.

the appropriation shall be by way of taking stock in the railway company, and that when they have thus determined, the amount cannot be recovered as a donation by the railway company, nor by its successor, by whatever means or method there may be a successor. To that conclusion we adhere, with much confidence in its correctness. We yield our assent to the proposition that where an appropriation has been lawfully made and completed, and a subscription for stock has been made in the manner provided by the statutes, such an appropriation and subscription become a binding obligation upon the township. But it will not do to say that the township can be bound by an obligation which it has in no legal way assumed. In other words, the township cannot be compelled to make a donation of the amount voted where, as here, it has been voted upon the condition that the township shall receive therefor an equal amount of stock in the railway company. The township will be held to the terms of the appropriation as expressed by the petition to the county board by the vote of the people and by the final order of the board, and so also will the railway company. The railway company must accept the appropriation as tendered by such petition, vote, and order, or not at all. If the people have thus declared that the appropriation shall be by way of taking stock in the railway company, they have a right to the stock in return for the appropriation, and the railway company can no more coerce the payment of the money without the stock than can the township demand the stock without the payment of the money. To hold otherwise would be to abolish all distinction between an appropriation by way of donation and by way of taking stock, which is so clearly established and recognized by our statutes and the cases, and to hold that, while the township may prescribe conditions, it is powerless to have them respected by the railway company. In short, it would be to hold, as before stated, that the township may be held by an obligation which it has in no way assumed. There is no reason why an appropriation by a township, by way of taking stock in a railway company, when within the authority given by the statutes and when the subscription is made, should not be considered a contract, just as a subscription for stock in such company by an individual is a contract. And clearly the township is entitled to all the protection that will be awarded to a private subscriber. The protection is not to be less because the people in the aggregate are concerned. *Cook, Stocks*, § 99; *Shipley v. City of Terre Haute*, 74 Ind. 297; *City of Buffalo v. Bettinger*, 76 N. Y. 396; *Gray v. State*, 72 Ind. 567 (580); *People v. Dutcher*, 56 Ill. 144. Mr. Cook, in his work above referred to, states the following, which is sustained by reason and by the cases: "Under the same circumstances and conditions and to the same

extent as any other subscriber a municipal corporation may compel a railway or other corporation to deliver to it stock to which the subscribers in general are entitled. It is entitled, like any other subscriber, to whatever it has subscribed for and paid for. Whatever would prevent an individual subscriber from enforcing such delivery will equally prevent a municipality in a like case. So, it is said that a municipal corporation, or a subscriber, is in no better position than an individual subscriber in this respect. The cases plainly make no distinction as to the right to enforce delivery of stock between classes of subscribers, and the municipal subscriber has no more and no less right in respect thereto than other subscribers." To the same effect see 1 Wood, Ry. Law, § 118. The foregoing is doubtless the general rule applicable in all cases, unless in some way varied or modified by the statutes authorizing the municipal aid. It is not modified or varied by our statutes.

It may be conceded, as contended by counsel for appellee, that it is not shown by the record that the Anderson, Lebanon & St. Louis R. Co. has not been dissolved by a decree of a court. It may be, therefore, that that corporation still has a legal existence; but while the pleadings are not very definite upon that subject, we think that it is made evident by the record that abundant causes for such a forfeiture exist, and that all that is necessary to end the existence of the practically defunct corporation is the judgment of a court. See 3 Wood, Ry. Law, p. 1711 *et seq.*; Rev. St. 1881, § 3930. Undoubtedly, the purpose of the people of the township in voting the appropriation by way of taking stock instead of by way of a donation was to acquire such an interest in the corporate property as shares of stock represent, and such an interest and voice in the management of that property and the company's affairs as appertain to stockholders in such corporations. Stock in a railway company is property which a municipality may sell. *Shannon v. O'Boyle*, 51 Ind. 565; *O'Boyle v. Shannon*, 80 Ind. 159.

After the appropriation was voted, and after one half of the amount had been collected and paid to the railway company for a like amount of its stock, and before the remaining one half had been collected or placed upon the tax duplicate for collection, the Anderson, Lebanon & St. Louis R. Co. abandoned the enterprise by an indirect alienation of all of its franchises, privileges, rights, and property of every description, and, since the sale under the decree of foreclosure, has owned nothing of value to be represented by shares in stock. For all practical and beneficial purposes, so far as concerns Noblesville township, that railroad company ceased to exist with the sale of all its franchises, privileges, rights, and property. Possibly that company

Sale of Anderson, etc., R. Co.'s property — Purpose of action.

still has such an existence that, if there is no statute in the way, it might collect unpaid subscriptions for stock for the purpose of paying its debts if it owes any which are yet binding obligations. Possibly a receiver might be appointed for it who, if there is no statute in the way, would have power to collect enough of the unpaid subscriptions for stock to pay its debts if it owes any which are still binding obligations. Possibly, too, for the payment of the debts of that corporation, if it owes any which are yet binding obligations, and if there is no statute in the way, the collection of the tax in question here might in some way be coerced. These are questions which we need not and do not decide, because they are not before us for decision. This is not an action by the Anderson, Lebanon & St. Louis R. Co., nor is it an action by a receiver appointed to close up its affairs, nor is it an action by any one for the purpose of collecting assets with which to pay the debts of that company. Although it is alleged that Cottingham, joined with the Midland R. Co. as a relator, is a taxpayer of the township, the purpose of the action is very plain. It is in no sense an action by, in behalf of, or for the benefit of the Anderson, Lebanon & St. Louis R. Co., or its general creditors. The action is the first step by the Midland R. Co. in its endeavor to compel the placing of the tax upon the duplicate, to compel the collection of the tax and the payment of the amount collected over to it, and leave the township and the taxpayers to hunt up and deal with the Anderson, Lebanon & St. Louis R. Co., and protect themselves as best they can.

It is averred in the return to the alternative writ, as stated in the principal opinion, that the mortgage which finally swept away all of the property of that company was executed in 1875. It is further shown in that return that, after the execution of the mortgage, that company abandoned all work upon the road, and the property passed into the hands of a receiver. Since then that company has had no property nor interest, so far as shown, which would require it to keep up its directory or elect officers, or which would in any way interest it in doing so. So far as shown, it has no office in this state for the transaction of business, nor for any other purpose. It may yet have bare legal existence; but it is evident that it would require more than an ordinarily skilful officer to find any representative of that company upon whom a writ might be properly served. To say that the township or the taxpayers must first pay to the Midland R. Co., and then look to the old company for its stock, is, for all practical purposes, to say that the money must be paid without the stock for which it was voted. It must be apparent that, if the Midland R. Co. shall succeed in its purpose to have

Payment by
township to
Midland Co.—
Looking to old
Co. for stock.

the money collected and paid over to it, the township and the taxpayers will be left without anything in return for the amount paid, and without any sort of protection. Such a result is not to be allowed unless imperatively required by settled rules of the law. Clearly, prior rulings will not be extended for the purpose of accomplishing such a result. On the contrary, those rulings should be and will be limited to the cases before the court in which they were made. As we have stated, one half of the amount voted was placed upon the duplicate and collected, and the amount paid over to the Anderson, Lebanon & St. Louis R. Co. in return for a like amount of its stock. While the county treasurer was engaged in the collection of that portion of the tax thus upon the duplicate, Wilson and others, taxpayers of the township, brought an action to enjoin the collection of the portion assessed against them. The case was brought here on appeal. It was in the decision of that case that this court said that the alleged insolvency of the railway company, and its alleged inability to complete the road, did not render the tax invalid or afford to the plaintiffs in the case sufficient ground for enjoining its collection. *Wilson v. Board, etc.*, 68 Ind. 507. The question and the facts involved in that case were different from those involved in the case before us. At the time that action was commenced, the Anderson, Lebanon & St. Louis R. Co. not only had a legal existence, but also, so to speak, a practical existence. And although it was alleged that the company was insolvent, it was in possession, as owner, of the road and all its corporate property. The tax, when collected, was to go, as it did, to the railway company, which the taxpayers intended to aid in return for an equal amount of its stock. The shares of stock, as issued, represented so much of the corporate property, and, in the proportion that it bore to the whole amount of the stock, entitled the township to a voice in the management of the property and affairs of the company. As applied to the case before the court, we adhere to the ruling in the case above, but do not think that it should be so applied or extended as to turn the case in hand in favor of the Midland R. Co.

The only question involved in the case of *Board, etc., v. State*, 86 Ind. 8, was whether or not the board of county commissioners had authority to make a third levy of taxes to raise the balance of the amount voted by the township in aid of the railroad company; the two prior levies having failed to produce the full amount by reason of shrinkage in the value of the property in the township. It was held that the board had such authority; that it was their duty to exercise it, and that it could be compelled by mandate to perform that duty; and that, as the matter was one

*Board, etc., v.
State exam-
ined.*

of public concern, any citizen, of the township, interested in the execution of the law might be the relator. It was in that case that it was said that, when an appropriation of not exceeding 2 per centum of the taxable property of the preceding year has been lawfully made, such an appropriation becomes a binding obligation upon the township, from which it is not discharged by any subsequent shrinkage in the value or destruction of any part of its taxable property. When an appropriation is once fully completed by all the steps required by the aid laws, and the subscription for stock is made by the county board as required by those laws, it does become a binding obligation upon the township. And, in the sense that for the purpose of fulfilling the requirement of those laws and subserving the public interest, the county board may in a case like that last above be compelled to levy a tax to meet an appropriation voted by the township. That vote, and the preliminary steps leading to it, may be said to create a binding obligation upon the township. In the case last cited it was not necessary to decide whether or not a simple vote of an appropriation by a township for the purpose of taking stock in a railway company creates an obligation which the railway company can enforce by any sort of an action against the township, or creates such a right in the railway company as it may assign or mortgage. Those questions were not decided. What was there said must be limited to the exact case before the court. It should again be observed that in that case the railway company, to aid which the appropriation was voted, owned the road and the corporate property, and that the taxes, when collected, would go to it in return for its stock.

The case of *Faris v. Reynolds*, 70 Ind. 359, is cited by counsel for appellees, in support of their contention that, by the mortgage, its foreclosure, and the sale under the decree, the purchasers became the owners of the uncollected portion of the amount voted by the township. That question is not decided in that case. That was an action by taxpayers of the township to enjoin the collection of a tax levied for the purpose of aiding a railroad company by taking stock. In their petition to the county board, the petitioners asked that the amount appropriated should be paid to the railroad company or its assigns. One of the grounds upon which they asked that the collection of the tax should be enjoined was that the railway company had transferred its interest in the tax to other parties. In disposing of that question, it was said: "It is not seen that any one is injured by the assignment of the claim. If the township gets the stock, which it is entitled to do either before or concurrently with the payment of the money, whether paid to the railroad company or its assigns, it cannot be material whether the money is paid to the railroad

Faris v. Reynolds.

company or its assigns. If the assignment is valid, the taxpayer is not injured. If invalid, it harms no one, and furnishes no reason why the tax should not be collected." It will be observed that the validity or invalidity of the assignment was not decided, and that no question as to the right of the assignees to enforce payment to them was involved.

The case of *State v. Board, etc.*, 92 Ind. 499, cited by counsel for appellees, is in every essential particular different from the case in hearing. In the first place, the railroad company, to aid which the appropriation was voted, owned the road, and hence, as already stated, stock in that company would represent the property, and entitle the township to a voice in the management of the affairs of the company. In the second place, the tax had been collected, and was in the county treasury at the time the company assigned a portion of the amount which it claimed was due to it. In the third place, the county board approved of the assignment. And in the fourth place, before the action to compel the payment by mandate was brought the railway company tendered the proper amount of certificates of its stock. It was held that, in connection with the standing order that the amount collected should be invested in the stock of the company, the payment of previous amounts to the company and the approval of the assignment of the portion to the bank constituted a subscription to the stock of the railroad company within the meaning of the statutes. The case was not one of an attempted assignment by a railroad company of an uncollected tax, or of an amount voted, but neither collected nor placed upon the tax duplicate, as is the case before us, but was one of an assignment after the tax had been collected and after a subscription to the stock of the railroad company had been made by the county board, as the statute required. Neither is the case of *Board, etc., v. Center Tp.*, 105 Ind. 422, either like or conclusive of the case before us. In that case the appropriation was voted as a cash donation, and not by way of taking stock in the railway company. The amount had been collected and was in the county treasury. The trust deed specifically named the donation voted by the township and then in the treasury as included within its terms. That the amount had been properly donated to the railway company was not questioned by counsel upon either side of the case. It was conceded in argument that the railway company claiming the money had succeeded to all of the rights of the old company in and to the donations.

The case before us must be disposed of and the rights of the parties settled upon the facts as developed by the record and under the statutes in force at the time the mortgage was executed in 1875, as the Midland R. Co. can claim no rights ex-

*State v. Board,
etc., Co.*

*Board, etc., v.
Center Tp.*

cept through that mortgage. The statute then in force, so far as material here, was the act of 1869. Acts Sp. Sess. 1869, p. 92. So far as material here, the fourteenth section of that act was as follows: "Said board of commissioners may, after the assessment herein provided for, or any part thereof, shall have been collected, take stock in such railroad company, from time to time, in the name of the proper . . . township, . . . and pay therefor when the same is taken out, the money to be collected as aforesaid," etc. It is very

Statutory provisions.

Simply voting aid not a subscription.

plain from this section and the whole act that the simple voting of the aid by the township is not a subscription to the stock of the railroad company.

That subscription is to be made by the county board, which for that purpose acts as the agent of the township. Until they execute that power and authority, there is no perfected subscription to the stock of the company. It is just as necessary that the board should act in that good regard in order to make a perfected subscription to the stock of the railway company as that they should act upon the petition provided for by the first section of the act, in order that there may be a valid vote by the township. When the subscription is thus made, and not before, the township becomes the owner of the stock. And although certificates of the stock thus subscribed for may not be essential to the ownership of the stock by the township, yet we think that in case of such subscription by the county boards for townships such certificates may be demanded as a condition to the payment of the money. That conclusion seems to be sanctioned by the case of *Faris v. Reynolds*, 70 Ind. 359 (364).

The case of *City of Mount Vernon v. Hovey*, 52 Ind. 563, cited by counsel for appellee, is not authority in support of contention that the vote of the township constituted a subscription to the stock of the railroad company. In that

Same—Authorities.

case the common council acted for the city, as the county board was authorized to act for the township by the fourteenth section, *supra*, of the act of 1869. In that case the common council made a donation to the railway company in behalf of the city, and issued the bonds of the city which had passed into the hands of innocent holders. When a subscription was made by the county board under the act of 1869, the township was brought into contractual relations with the railway company, and it thus acquired rights which it could enforce by action and which it could assign. While the ownership of the stock subscribed for by the county board under that act passed to the township in return for the money paid, it seems not to have been essential that the payment of the money should accompany the subscription for the stock in order that the township

should become the owner of such stock. The seventeenth section of the act provided as follows: "After the money authorized by this act to be appropriated shall have been levied and collected as aforesaid, and the subscription shall have been made on behalf of the . . . township, . . . the railroad company, for whose aid the same shall have been levied and collected, having fully constructed the railroad, . . . shall have the right to demand and have said money paid over according to the intent and meaning of this act," etc.

In the case of *Bittinger v. Bell*, 65 Ind. 445 (453), already cited, in speaking of the rights of railway companies under the above statutes involved here, it was said: "It has been repeatedly decided by this court . . . that until the tax was levied and collected, and a legal and valid subscription had been made on behalf of the township, the railroad company did not have, and could not acquire, any legal right to, or interest in, the tax, which it could enforce by legal process." In support of the statement thus made were cited *Board, etc. v. Railway Co.*, 39 Ind. 192; *Sankey v. Railroad Co.*, 42 Ind. 402; *Petty v. Myers*, 49 Ind. 1; *Jager v. Doherty*, 61 Ind. 528. Those cases all fully support what was stated as above quoted. So, too, does the case of *Hilton v. Mason*, 92 Ind. 157. Until the railway company occupies a position which will enable it to enforce in some way whatever right or interest it may have in an appropriation voted, such voted appropriation is not a chose in action in its favor which it can assign or mortgage. A chose in action has been defined to be a thing which a man has not the actual possession of, but which he has a right to demand by action. *Ramsey v. Gould*, 57 Barb. 408.

In the case of *Dial v. Gary*, 14 S. C. 573, it was said that a chose in action embraced two ideas: First, a visible, tangible thing; and, second, the right to sue for and recover that thing. That a railway company has no right in or to an appropriation voted for the purpose of taking stock in such company which it can enforce by an action or assign or in any way transfer to another until the subscription for stock shall have been properly made by the county board, is recognized in the case of *City of Mount Vernon v. Hovey*, *supra*, and broadly asserted and ruled in the case of *Harshman v. Bates Co.*, 3 Dill. 150, 92 U. S. 569. In that case an appropriation had been voted by a township under a Missouri statute for the purpose of taking stock in a designated railroad company. The county court, as was the board of county commissioners under the act of 1869, *supra*, was authorized to make the subscription to the stock of the railroad company in behalf of the township and in pursuance of the vote. After the vote, but before the subscription by the county court,

the designated railroad company was consolidated with another railroad company. After the consolidation, and without a further vote, the county court made a subscription to the stock of the consolidated company. It was held that a vote of the people to take stock in the designated company did not authorize the county court to subscribe to the stock of the consolidated company, and that, therefore, the subscription to that company did not entitle it to the appropriation voted, and did not impose any obligation upon the township. The decision was placed upon the ground that the township had a right to insist upon stock in the railroad company for which the appropriation had been voted, and that they could not be compelled to accept stock in any other company. In a note to the case by Dillon, J., and in distinguishing it from the case of *Nugent v. Supervisors*, 19 Wall. 241, it was said: "That case differs from the one above reported in this: there the subscription to one of the constituent companies was before the consolidation; here it was afterwards. In this case there was nothing but a bare vote before the consolidation, and that, without more, creates no contract between the municipality and the railroad company," etc. The decision by Dillon, J., as also his reasoning, as far as we have stated it, were approved by the supreme court of the United States upon the appeal. See also *City of Mount Vernon v. Hovey*, 52 Ind. 572. That case is also distinguishable from a class of cases cited by counsel for appellee, where county officers or courts authorized to subscribe for stock in behalf of townships have subscribed to the stock of a consolidated company instead of to the stock of the company to which the aid was voted by the township, and where bonds have been issued in payment for the stock which, without showing upon their face any informality or infirmity, have passed into the hands of *bona fide* holders. In the case before us, as we have seen, the tax has not been collected, nor has it been placed upon the duplicate for collection. There has been no subscription for stock made by the county board, nor in any other way. The case is, therefore, materially different from some of the cases above noticed, and in this regard materially different from other cases cited by counsel for appellees, where it was held that after a subscription for stock has been made, such subscription is a chose in action in favor of the railroad company, which it may assign and alienate. When a subscription is made in the manner required by the statute, the township is brought into contractual relations with the railway company, just as is an individual by a subscription for stock.

We do not think it necessary to extend this opinion to comment much more at length upon the cases of *Scott v. Hansheer*,

94 Ind. 1, and *Jussen v. Board, etc.*, 95 Ind. 567. As stated in the principal opinion, those cases involved appropriations by way of donations, and not by way of taking stock in the railway company. They did not involve the right of a railway company to assign an uncollected aid voted for the purpose of taking stock in such company. Those were cases where the railway companies to which the aid had been voted had been consolidated with other railway companies, and rest upon principles and rules of law and statutes peculiar to such cases. If it should be conceded that by the simple vote of the township a subscription to the stock of the Anderson, Lebanon & St. Louis R. Co. was made, the Midland R. Co. would be in no better position to demand the money. Upon such a concession we should be led to a consideration of a statute discussed by counsel on both sides of the case upon the original hearing, and again pressed for consideration by counsel for appellants in their brief resisting the petition for a rehearing. It was not thought necessary to extend the opinion in the decision of the case in a consideration of that statute, and we give it attention now because of the earnestness with which counsel for appellees urge their petition for a rehearing, and because counsel for appellants again insist that it is conclusive of the real question involved in the case. In 1865 (Acts Reg. Sess. 1865, p. 66; Rev. St. 1881, § 3945 *et seq.*), an act was passed, entitled "An act to authorize, regulate, and confirm the sale of railroads, to enable purchasers of the same to form corporations and to exercise corporate powers," etc. The act provides that in case of a sale of any railroad by virtue of any mortgage by foreclosure, etc., the purchasers thereof, etc., may form a corporation, etc., with power to operate the railroad, etc. The third section of the act (section 3947, Rev. St. 1881) provides that "such corporations shall possess all the powers, rights, privileges, immunities, and franchises in respect to said railroad . . . purchased . . . which were possessed or enjoyed by the corporation that owned or held the said railroad previous to such sale, . . . and it shall have power, at any time after the formation of the corporation as aforesaid, to assume any debts and liabilities of the former corporation, and to make such adjustment and settlement with any stockholder . . . or creditor . . . of such former corporation as may be deemed expedient: . . . provided, that all subscribers to the original stock of said railroad company, their heirs, executors, and administrators, shall (by the acceptance or adoption of this act by any purchaser or purchasers of any such railroad as above provided) be released and discharged from all their unpaid subscriptions, which shall not have been previously settled or arranged by agree-

Cases not commented on.

Act of 1865 concerning sale and reorganization of railroads.

ment or compromise," etc. Recognizing the fact that stock in an insolvent railway company, the property of which has been sold in a foreclosure or other judicial proceeding, is worthless, this statute was intended to protect subscribers by cancelling all obligations to pay unpaid subscriptions to such stock in all cases where there shall not have been an adjustment by agreement or compromise. In other words, the statute was intended to enact into a law the rule of fair dealing, that no one should be required to pay something for nothing. In answer to one of appellees' contentions, it is enough to say that in our judgment it sufficiently appears from the record that the Midland R. Co. was incorporated under the above act, and by virtue of the sale and such incorporation became the owner of the property of the old company.

It is further contended on the part of appellees that the statute is not applicable here because it was enacted four years before any law was in existence authorizing townships to vote aid to railway companies, and that, therefore, the proviso in the section quoted could not have been intended to apply to a case like this. The title of the act, as to its various sections, shows that it was not intended to subserve any mere temporary purpose. Its terms are general and applicable to all cases arising subsequent to its passage. The proviso was intended to and does protect all subscribers to stock in railway companies. That at the time of its passage there was no law authorizing municipal corporations to vote aid and become stockholders in railway companies does not change the matter. They may now, and at the time Noblesville township voted the aid they had authority to, thus become stockholders. If it be conceded that by the petition to the county board and by the vote of the people Noblesville township became a subscriber to the stock of the Anderson, Lebanon & St. Louis R. Co., it thus came within the terms of the above statute, and became entitled to its protection as any other subscriber to stock in that company. To hold that the proviso protects only such of the subscribers to stock as may have signed the articles of incorporation of the old company, or that it protects only individuals and not municipal subscribers to such stock, would be to give to the act such a construction as to make it work inequality and injustice as between subscribers to stock. Such a construction is not required, but, on the other hand, is forbidden, both by the spirit and letter of the act. In support of our conclusion that the act is applicable to subscribers who may become such under subsequent statutes, see *State v. Chapin*, 110 Ind. 272. If we are correct in our construction of the above act, and the proviso in the third

Purpose of statute.

Municipal subscription comes within terms of statute.

section,—and that we are, we have no doubt,—Noblesville township was released and discharged from the unpaid subscription for stock in the Anderson, Lebanon & St. Louis R. Co. by the sale of all its property under the decree of foreclosure and the subsequent incorporation of the purchasers as the Midland R. Co., there having been no settlement with the township as provided by the statute under consideration. Such statutes ought to be given a fair construction, and at the same time such a construction as will protect the taxpayers. This is shown by the Iowa and other cases. There was a statute in Iowa, which, for aught we know, is in force yet, which provided that, in the giving of aid to railway companies, the taxpayers were entitled to receive stock in the corporation constructing the railroad in the amount of taxes paid by each, etc. Under that statute aid was voted to a railway company by the people of a township. After the aid had been voted, the company to which the aid had been so voted, and before it had completed its road, sold and conveyed its unfinished railroad to another company. In an action by a taxpayer to enjoin the collection of the tax (*Manning v. Mathews*, 66 Iowa, 675), the supreme court said: "The statute, in providing for the enforced contributions by taxation to aid the construction of railroads, contemplates that the taxpayer may become a stockholder, upon the ground, doubtless that he ought not to be compelled to make contribution, to a private enterprise producing public benefits, wholly without compensation; and that, as the railroad is a thing of public nature, producing benefits in which the taxpayer shares, he ought to be in the position, as a stockholder, to have a voice and influence in preserving its existence and controlling its use, so as to secure the public benefits for which it was built. The object of the statute was not, primarily, that the taxpayer should receive money or any other thing upon payment of his tax, but that he should receive the stock in the corporation building the road, to the end that he should have an interest in the road built. His stock, if separated from the railroad, would be to him as any other property. It cannot be that the statute intended that he should be taxed to aid in the building of the railroad, and that, before his tax is collectible, the road could be alienated, and in its place the corporation could acquire bonds or other property to be held for the benefit of the stockholders. The statute does not contemplate that the taxpayer shall hold an interest as a stockholder in any property other than the railroad. . . . It cannot therefore be that the statute will permit taxes to be collected when it becomes certain that the taxpayer can have no interest in the railroad, the very thing for which he was taxed. It is plain, from the provisions of the statute making the directors

Township released by sale of property.

liable in double the par value of the stock in case the road is encumbered beyond the prescribed limit, that it is the purpose of the statute to preserve the existence of the road in the corporation building it, and thus preserve the taxpayer's interest therein." The tax was held uncollectible. To the same effect are the cases of *Blunt v. Carpenter*, 68 Iowa, 265; *Cantillon v. Railroad Co.*, 35 N. W. Rep. 620.

We think that it may reasonably be said, of our statutes authorizing townships to aid railway companies by way of taking stock therein, that they contemplate that the township, by becoming a stockholder, may have such an interest in the property of the corporation as shares of stock usually represent, and such an influence in the management of the affairs of the corporation as any other holder of a like amount of stock usually has. And that the act of 1865 last above referred to was enacted upon the theory that, when a railway company no longer owns the railroad by reason of a judicial sale as provided in that act, an unpaid subscription to its stock ought not to be coerced because the subscriber cannot acquire an interest in the railway nor have a voice in its management. We are aware, of course, that these aid laws have been upheld as against constitutional objection urged against them upon the theory that the railroad in aid of which the money is to be appropriated is a work of public utility, to be constructed for the public good. So far as the constitutionality of the law is concerned, it may be said, as is said in some of the cases cited by counsel for appellees, that there is no difference between an appropriation by way of a donation and by way of taking stock in the railroad company. But it does not follow, by any means, that there is no difference in any respect between aid by a township by way of a donation and by way of taking stock. As we have seen, our statutes and our cases clearly create and recognize a distinction, and both secure, to the township, rights, when the aid is by way of a subscription for stock, which it does not have when the aid is by way of a donation; and both good morals and public policy sanction the extension of such protection to the township and taxpayers.

We repeat again that this action is in no sense by the Anderson, Lebanon & St. Louis R. Co., nor by any one in its behalf for its benefit or for the benefit of its creditors. The Midland R. Co. has and can have no right to the money should it be collected, for the reason that it claims and must claim through the mortgage, and that neither carried nor conveyed any interest in the aid voted which can be enforced in favor of that company, and for the further reason that the act of 1865, *supra*, is in the way of an assertion of such right by that company. And while, as before stated, the

Midland R.
Co. not en-
titled to
money.

record does not show that the Anderson, Lebanon & St. Louis R. Co. has been dissolved by a judicial decree, we again state, as stated in the principal opinion, that it does not appear, by anything shown in the record, that there is any person or railroad company entitled to demand and receive the money upon the terms upon which it was voted, should it be collected. We have examined with much care all the cases cited by counsel for appellees and find nothing in any of them in conflict with what we here decide. It would extend this opinion to an undue length to go into an examination and analysis of those cases. This is the only reason for not doing so. After a patient and laborious examination of the questions presented by the record, we are convinced that the conclusion reached in the principal opinion is correct, and that a rehearing should not be granted. The petition is therefore overruled. We suggest that, if the parties desire to remodel the pleadings, either by changes or by making them more specific, they ought to have leave to do so.

Corporation—Subscription to—How Made.—As to what constitutes a subscription to a corporation, see *Butler University v. Scooner* (Ind.), 16 N. E. Rep. 642.

Rights of Purchasing and Consolidated Companies to Subscriptions Made to Original Company.—See *Menasha v. Hazard*, 2 Am. & Eng. R. R. Cas. 571; *Atchison, etc., R. Co. v. Phillips Co.*, 4 Ib. 326; *Lynch v. Eastern, etc., R. Co.*, 12 Ib. 652; *Chickaming v. Carpenter*, 12 Ib. 692; *New Buffalo v. Cambria Iron Co.*, 12 Ib. 703; *Green Co. v. Conners*, 15 Ib. 613.

PETTIBONE *et al.*

v.

TOLEDO, C. AND ST. L. R. CO. *et al.*

(*Massachusetts Supreme Judicial Court, January 2, 1889.*)

Railroad Companies—Subscription to Bonds—Unpaid Subscription.—The agreement, of holders of mortgage bonds of a railroad company, to lend the company certain amounts of money, and to take in payment therefor interest-bearing debenture bonds of the company, does not amount to an unpaid subscription to the capital stock of the company, but is, in effect, an agreement to make a loan to the company upon the bonds as security.

Same—Application of Subscription—Rights of Creditors.—A bill will not lie, in favor of the creditors of such company, to compel the subscriptions to the bonds to be applied on their claims; and the fact that such debenture bonds were issued to enable the company to complete its road creates no trust in favor of creditors for supplies furnished in its construction.

Same—Contract Executory—Assignability.—Massachusetts Pub. Stat., ch.

151, § 2, cl. 11, giving a remedy in equity to creditors, to reach "any property, right, title, or interest, legal or equitable," of a debtor, does not apply to such contracts between the subscribers to the bonds and the corporation, since the contract is executory on both sides and is not assignable by either party.

RESERVED case from Supreme Judicial Court, Suffolk County.

This was a suit brought by creditors of the Toledo, Cincinnati & St. Louis R. Co., against certain of the holders of the first-mortgage bonds of said company, to compel them to pay certain subscriptions to the debenture bonds issued by the railroad company, and, when paid, to be held for the benefit of the plaintiffs.

Heard in the Supreme Judicial Court, and reserved for the full court.

John Lowell, James H. Flint, and Morse Thane for plaintiffs.

H. D. Hyde and W. A. Sargent for defendants.

FIELD, J.—The first ground on which the plaintiffs contend that the bill may be maintained is that the subscriptions of the defendants, which are described in the bill, are analogous to such subscriptions for the capital stock of a corporation, and that such subscriptions constitute a trust fund for the benefit of the creditors of the corporation. It has been held that all persons who deal with a corporation deal with it on the faith that its capital stock will be applied, if necessary, to the payment of its debts; and that, if the statutes of a state permit a corporation to do business before the whole amount of its capital stock has been paid in, the money which subscribers for stock have agreed to pay in for the stock they have taken is regarded as a part of the capital stock of the corporation. The admission of the subscribers as stockholders is the consideration for their promises to pay; and the corporation can recover the amount agreed to be paid, not merely as a debt due to the corporation, but as a part of the capital stock which the subscribers have agreed to furnish and put at the risk of the business. The unpaid subscriptions are a trust fund held for the benefit of the creditors of the corporation; and any creditor whose debt has been reduced to a judgment, and who has been unable to obtain satisfaction of it from the corporation, may, under the general jurisdiction of a court of chancery, maintain a bill to apply these subscriptions to the payment of his judgment. County of Morgan *v. Allen*, 103 U. S. 498; *Hatch v. Dana*, 101 U. S. 205; *Sawyer v. Hoag*, 17 Wall. 610; *Bartlett v. Drew*, 57 N. Y. 587.

If we assume that this is the law in this commonwealth, it is necessary to examine the nature of the subscriptions set out in

Subscriptions
not analogous
to subscrip-
tions for capi-
tal stock.

the bill. The bill alleges that in December, 1882, "certain holders of the first-mortgage bonds of said railroad company made and entered into an agreement, under seal, with said company, whereby they subscribed and agreed to pay respectively to said railroad company a certain sum of money as called for, the first call to be for fifteen per centum of said subscription, and no subsequent call to exceed ten per centum thereof in any one month; the subscribers to receive therefor the debenture bonds of said railroad company, payable in five years, with option on the part of the company to pay after two years from that date, and bearing interest at the rate of eight per cent per annum, payable semi-annually," etc. The bill also alleges that the persons named as defendants signed this agreement, with others whose names the plaintiffs are unable to state; that the company has called for the payment of certain instalments of the money agreed to be paid; that the defendants have not paid the sums called for, and now owe the company these sums; and that they also, under said agreement, owe the company certain additional amounts not yet called for.

Nature of subscriptions.

It thus appears that the defendants are holders of the first mortgage bonds of the railroad company, and have agreed to lend the company certain amounts of money, and to take in payment therefor bonds of the company, such as have been described. They are creditors of the company who have agreed to make an additional loan. Even if the agreement be construed to be an agreement to purchase bonds of the company, as the bonds are obligations of the company to pay money, the transaction would be equivalent to a loan.

The distinction between a creditor and a stockholder of a corporation is plain. The position of a stockholder is not only not like that of a creditor, but it more nearly resembles that of a debtor of the creditors of a corporation. In a partnership, the copartners are debtors *in solido*; in corporations, the artificial body is the debtor; but the property of the corporation, which must be applied to the payment of its debts, belongs equitably to the stockholders, and they are virtually the debtors of the creditors of the corporation, so far as it may be necessary to take this property to pay such creditors. If these defendants should lend the money as they have agreed, and should receive the bonds of the company, they would be entitled to have the bonds paid out of the property of the company when they matured, or, if the company was insolvent, to share with other creditors in this property. The defendants have no other control over the corporation than that which a creditor has over the property of his debtor; nor have they put, or agreed to put, their money at the risk of the business in any other sense than that in which every

Distinction between creditor and stockholder.

creditor puts the money he lends at the risk of the solvency of his debtor. If the capital stock of a corporation is a trust fund for the benefit of its creditors, and if subscribers to stock who have not paid their subscriptions are regarded as trustees of this fund to the extent of the subscription unpaid, then these defendants have agreed to become *cestuis que trustent* of this fund. We think there is no foundation for the analogy suggested.

It is clear that the bill does not set out any special trust in favor of the plaintiffs. The defendants have made no promises to the plaintiffs, nor has it been agreed between the defendants and the company that the money should be paid and received upon a trust in favor of the plaintiffs. The plaintiffs have furnished railroad supplies, and the defendants have agreed to lend money to enable the company to complete its railroad, but this does not constitute a trust for the plaintiffs.

No special trust.

The remaining ground on which the plaintiffs contend that the bill may be maintained is that by this agreement the defendants have become indebted to the company, and that this indebtedness can be reached and applied to the payment of the plaintiff's claim, under Pub. St. c. 151, § 2, cl. 11, and St. 1884, c. 285. The first statute on this subject was St. 1851, c. 206. This gave a remedy in equity "to reach and apply in payment of a debt due from any debtor not residing in this commonwealth any property, right, title, or interest, legal or equitable, of such debtor within this commonwealth, which cannot be come at to be attached or taken on execution in a suit at law against such debtor." This statute was amended by St. 1858, c. 34, by striking out the words "not residing in this commonwealth," and the two statutes have become incorporated in Pub. St. c. 151, § 2, cl. 11. Full equity jurisdiction was first conferred upon this court by St. 1857, c. 214, and until that statute was passed, the court had jurisdiction in equity only upon special subjects described in the statutes. It has often been held that the intention of St. 1884, c. 285, was not to give jurisdiction over "creditors' bills," in the sense in which these words were used in the practice of the courts of chancery." *Chapman v. Publishing Co.*, 128 Mass. 478.

Reaching and application of defendants' indebtedness under statute.

The word "creditors' bills," are commonly used in the English chancery to describe bills brought by the creditors of the estates of a deceased person for the administration of the estate, or by creditors and claimants of a trust fund for the distribution of the fund. Such bills may be brought by many several creditors jointly, or, if brought by one creditor, must be brought for the benefit of himself and all other creditors interested in the estate or the fund. But the

Same—"Creditors' bills."

words are also used to describe bills brought by creditors who have obtained judgments at law, and who have in vain attempted at law to obtain satisfaction of the judgments, and who sue in equity for the purpose of reaching property which could not be taken on execution at law. Such bills could be maintained by a single creditor without joining others. It is obvious that the legislature had in mind, in passing this statute, suits substantially of the latter description; and such suits or similar suits must be considered, if any help is to be derived from analogy. There was valuable property of various kinds not exempt by statute from being taken on execution, which could not be reached by any form of process existing in this commonwealth at the time the statute of 1851 was passed. If the debtor were found within the commonwealth, he could be arrested on execution, and compelled by imprisonment to assign his property, if he had any, to his creditors; but the process was somewhat cumbrous, and the assignment of property might be made to other creditors than the judgment creditor, and this process could not be used against a non-resident debtor who could not be found within the commonwealth. As attachment on mesne process prevailed in this commonwealth, the legislature, following the analogy of trustee process, in creating this new remedy for the collection of a debt, did not require that the debt should be reduced to a judgment, and that all legal remedies should be exhausted.

In 1847, in *Grew v. Breed*, 12 Metc. 367, this court in effect decided that in equity a promissory note could be sequestered and applied to the payment of a decree for money rendered against the owner of the note in a suit in equity, brought under Rev. St. c. 36, §§ 31, 32; and it was suggested that the same remedy could be employed in courts of general equity jurisdiction to satisfy judgments for money obtained at law, if the execution had been returned unsatisfied. The bill in that case was regarded as ancillary to the original suit, and within the jurisdiction under which that had been brought; but jurisdiction to maintain bills to satisfy judgments at law, by sequestering or taking property which could not be taken at law, did not exist until the passage of the Statutes of 1851, which gave a remedy to a creditor whether the debt was or was not reduced to a judgment. After the statute giving full equity jurisdiction to this court was enacted, it was held that it did not affect the jurisdiction conferred by the Statutes of 1851, as amended by the Statutes of 1858, but the general equity jurisdiction over suits to collect a judgment obtained at law by reaching property which could not be taken on execution was not much considered. Ultimately it was decided that the two jurisdictions were not in all respects identical as to the property that could be reached, and

St. 1884, c. 285, was passed. *Barry v. Abbot*, 100 Mass. 396; *Insurance Co. v. Abbot*, 127 Mass. 558; *Tucker v. McDonald*, 105 Mass. 423; *Carver v. Peck*, 131 Mass. 291; *Ager v. Murray*, 105 U. S. 126.

It must be admitted that the extent to which choses in action could be taken by a court of equity, acting under its general powers, without the aid of statutes, was not very well defined; and it is said that in England a chose in action could not be taken "where the individual in whose hands it is disputes either the amount or the title of the party whose property is sequestered." The legal choses in action actually taken under this general equity power have been debts for definite sums of money. 2 *Daniell*, Ch. Pr. (5th Amer. Ed.) 1052, 1053. See *Hadden v. Spader*, 20 Johns. 554; *White v. Geraerd*, 1 Edw. Ch. 336; *Greene v. Keene*, 14 R. I. 388. The subject is now largely regulated by statute, both in England and in the states of this country. 3 *Pom. Eq. Jur.* § 1415; 2 *Barb. Ch. Pr.* (2d. Ed.) 147 *et seq.*; *Evans*, Pr. Ch. Div. 356 *et seq.*; *Morgan*, Ch. (6th Ed.) 455 *et seq.* Without considering such intangible property as letters patent, copyright, and the right to a seat in an exchange, or equitable interests in property, and speaking only of legal choses in action, it may be said that, so far as our knowledge extends, the choses in action that under the various statutes have been taken and applied to the payment of debts have been themselves debts due or to become due, although not always debts for definite sums of money. Perhaps *Hudson v. Plets*, 11 Paige, 180, is an exception; but that decision, whether right or not, does not help this case. The word "debt," even in its broadest signification, implies that the consideration of the obligation of the debtor has been executed on the part of the creditor, and the payment of the debt discharges the obligation. The execution of the agreement described in the bill did not make the defendants debtors of the railroad company. The obligations created by the agreement were executory on both sides, and were mutual.

It is no objection to this bill that the principal debtor is a foreign corporation, and that no service has been made upon it which would enable the court to render a decree that it would be bound to perform, unless it is essential to the plaintiff's case that they obtain an assignment of the agreement from the railroad company. The cases are numerous where debts due from inhabitants of this commonwealth to non-residents have been attached by this process, and it was to reach the property of non-residents that the statute of 1851 was passed. *McCann v. Randall*, 147 Mass.—. The language of the statute is undoubtedly broad. It is: "Any property, right, title, or interest, legal or

Taking of
choses in ac-
tion by equity.

Fact that prin-
cipal debtor is
foreign cor-
poration im-
material.

equitable, of a debtor." No case appears in our reports where under this process, a plaintiff has been permitted to compel his debtor to execute on his part an executory contract, made with other persons, or has been permitted to execute it for him, in order that the plaintiff may compel these other persons to perform their part of the contract for the benefit of the plaintiff, neither has any claim for unliquidated damages for the breach of an executory contract been reached and applied under this procedure. We think that a negative test of the meaning of the general words of the statute is that they cannot be held to include choses in action which, from their nature, could not be assigned by the debtor. The contract between the railroad company and the defendants in this case is one which the railroad company could not assign to the plaintiffs, so as to substitute them for it, as a contracting party. The defendants, as holders of the first mortgage bonds, had an interest in enabling the railroad company to complete its railroad, and an agreement by the defendants to advance money to the railroad company for this purpose could not be transferred by the railroad company to the plaintiffs, so that the defendants could be compelled to pay the money to them, even although they were ready to deliver the bonds which the railroad company had agreed to deliver. To accomplish this would require a novation. If, then, the railroad company were a party to this suit, the court would not compel it to make an assignment of the agreement against the will of these defendants, because it would not recognize as valid such an assignment after it had been made. The railroad company's interest in the contract, therefore, cannot be sold or assigned, and the defendants cannot be compelled to receive the plaintiffs in place of the railroad company as the party to whom they are bound.

What not included in statute.

It may be suggested that the bill shows that there has been a breach of the agreement by the defendants, in not paying the sums of money called for by the railroad company, and that, although the plaintiffs may not be able to enforce this agreement specifically against the defendants, they may have a right to reach and apply the damages which the railroad company could recover for the breach, to the extent at least of the indebtedness of the railroad company to them. It may be argued that a claim for unliquidated damages for the breach of a bilateral executory contract may be assigned in equity, and that such a chose in action can be reached by this process. We have been shown no case in which this has been done, and the difficulties are great. Such a proceeding would involve a trial of the whole cause of action of the railroad company against these defendants for the breach relied on, and entire damages must be assessed,

Bill not drawn to include unliquidated damages.

even although they exceed the indebtedness of the railroad company to the plaintiffs. If a receiver were appointed, it may be that he could be empowered to bring such a suit, but it is at least doubtful whether the court has authority to appoint a receiver of the property of a foreign corporation which is not subject to the jurisdiction of the court, and has not appeared in the suit. It is enough, however, to say that the bill was not drawn for the purpose of reaching any such claim for unliquidated damages, and the many questions which would arise upon a bill so drawn have not been argued, and need not be considered.

Demurrer sustained.

REED

v.

OHIO AND MISSISSIPPI R. CO.

(*Illinois Supreme Court, June 16, 1888.*)

Railway Mortgage—Foreclosure—Master's Deed—Prima Facie Evidence.—Under Illinois Rev. Stat. ch. 72, sec. 33, making the deed of a master in chancery, executed pursuant to a foreclosure decree, *prima facie* evidence that the provisions of the law relating to the sale have been complied with, it is only in case of the loss or destruction of the record of the decree that such deed becomes *prima facie* evidence of the recovery and existence of the decree.

Same—Rights of Purchaser—Deed as Evidence.—The deed is evidence of the regularity of the sale, but not of the prior proceedings authorizing it, and hence a petitioner, desiring to insist upon any right acquired under such deed, should produce a decree of the court authorizing the sale.

Same—Eminent Domain—Statutory Construction.—In all cases where private property may be taken for public uses, proceedings to condemn are authorized only when "the compensation to be paid for, or in respect of, the property so to be appropriated or damaged cannot be agreed upon by the parties interested," unless the owner is incapable of consenting, or his name and residence are unknown, or he be a non-resident of the state. Illinois Rev. Stat. ch. 47, sec. 3 (R. & S. 1042). Such proceedings are permitted under statute, whether for the purpose of acquiring land or material, only in the event that the corporation seeking the appropriation is unable to agree with the owner for the purchase of the same.

Same—Successor—Condemnation of by.—A railroad company, claiming as successor of another company, whose charter gives it the right to acquire and hold property for its corporate purposes, providing that "in case of disagreement as to the right of way, price of land or lands, or other privileges embraced in this section, the same may be condemned" under the eminent domain laws in force, can obtain material by condemnation only in the event that it is unable to agree with the owner for the purchase thereof.

Same—Petition in Condemnation—Allegations.—Although the averments in petition for condemnation need not be in the language of the statute, yet they must affirmatively show that the corporation has been unable to agree with the land-owner in respect to the compensation.

Same—Compensation—Instructions.—Where an instruction requested to the effect that the compensation to be paid to the defendant land-owner was its value "for any purpose for which it was shown by the evidence to be available," was modified by striking out the words quoted, and confining the value to the worth of the land, "as land, as it is at this time, as shown by the evidence," the modification was held improper.

Same—Market Value of Land—Province of Jury.—The present market value of the land taken furnishes the true basis for determining the compensation to be paid the land-owner for land taken and appropriated to the public use, which value is to be determined by the jury from the evidence, either as furnished by the testimony of witnesses or by their personal inspection of the premises.

Same—Uses Adapted to—Evidence of.—In so far as the adaptability of the land to uses other than that to which it is applied enhances or influences its present market value, such uses are competent to be considered by the jury.

APPEAL from a judgment against defendant in a proceeding to condemn land for the purpose of taking therefrom sand, rock, gravel, and earth.

The facts are sufficiently stated in the opinion.

R. Cope for appellant.

C. A. Beecher and Hanna & Adams for appellee.

PER CURIAM.—This was a proceeding by appellee to condemn ten acres of land, lying outside of its right of way, for the purpose of taking therefrom sand, rock, gravel, and earth for ballast, and to maintain its roadway. Facts.

The petition, after averring the incorporation of petitioner, and that it has for ten years owned and operated, and is now operating, a line of railway through Gallatin county, avers that by an act of the legislature of Illinois, approved February 25, 1867, a charter was granted to the Illinois Southeastern R. Co., by which it was authorized to build, construct, equip, and maintain a railroad through Gallatin county, and for that purpose to condemn right of way; and in addition thereto said railway company was authorized and empowered by its charter to condemn other land, beside that required for right of way, for the purpose of procuring sand, gravel, stone, and earth, and other material for the purpose of constructing and maintaining said railroad.

That under certain foreclosure proceedings against said Illinois Southwestern R. Co., the petitioner, by purchase, became the owner of all the property, rights, and franchises belonging to said railway, whereby petitioner became authorized and empowered to operate and maintain said railroad, with all

the rights, powers, and franchises delegated to the said last-named company by virtue of its charter and the laws of this state.

That in order to procure rock, gravel, earth, and sand to properly ballast and maintain said railroad, and improve the same, it is necessary to take and appropriate other lands than that included in the right of way thereof through Gallatin county. The land sought to be taken is then described, and it is averred that the company has in said county no suitable material for the purposes named on its right of way. It is alleged that appellant, who is made defendant, is the owner of the land sought to be appropriated. The defendant, appellant, answered, denying each material allegation of the petition, except the ownership of the land sought to be appropriated.

The case was submitted to a jury, who returned a verdict, fixing the compensation to be paid the land-owner; and the court entered the usual order thereon.

While under the statute no other pleading than the petition is required, it is manifest that the answer filed neither enlarged nor restricted the burden cast by law upon the petitioner to make such a case as clearly entitled it to take and appropriate the land sought to be taken. *Smith v. Chicago & W. I. R. Co.*, 105 Ill. 511; s. c., 14 Am. & Eng. R. R. Cas. 384.

It is contended by appellee railway company that under and by virtue of the deed of the master in chancery, made, as is alleged, in pursuance of a decree of foreclosure against the Illinois Southeastern R. Co., it succeeded to all the rights, privileges, and franchises of said last-named company, and is by the charter of said company authorized to appropriate the land of appellant for the purposes shown. No discussion of this question is necessary, as no conveyance of the property and franchise of the Illinois Southeastern R. Co. is shown in this record. The petitioner introduced in evidence a mortgage made by said company, and a deed executed by the master in chancery of the circuit court of the United States for the southern district of Illinois, purporting to be made in pursuance of a decree of foreclosure entered in said court, conveying the property and franchise of said corporation to one Bloodgood; and conveyances vesting whatever title Bloodgood derived by said master's deed in petitioner; but no proceeding or decree upon which said deed was based was produced. By Rev. Stat. ch. 72, § 33, the master's deed is made *prima facie* evidence that the provisions of the law relating to the sale have been complied with; and it is only in case of the loss or destruction of the record of the decree that such deed becomes *prima facie* evidence of the recovery and existence of the decree.

Mortgage foreclosure—Master's deed as evidence of decree.

If petitioner desired to insist upon any right acquired under that deed, it should have produced a decree of the court authorizing a sale and deed. The deed is evidence of the regularity of the sale, but not of the prior proceedings authorizing it. *Fischer v. Estaman*, 68 Ill. 78.

But, independently of these considerations, this proceeding is clearly erroneous.

In all cases where private property may be taken for public uses, proceedings to condemn are authorized only when "the compensation to be paid for, or in respect of, the property sought to be appropriated or damaged, . . . cannot be agreed upon by the parties interested"—unless the owner is incapable of consenting, or his name and residence are unknown, or he be a non-resident of the state. Rev. Stat. ch. 47, § 2 (R. & S. 1042). If the right to condemn appellant's land for the purposes here sought be conceded, such proceedings are permitted by the statute, whether for the purpose of acquiring land or material, only in the event that the corporation seeking the appropriation is unable to agree with the owner for the purchase of the same. Rev. Stat. ch. 114, §§ 18, 19 (Starr. & C. 1912); *Chicago, B. & Q. R. Co. v. Chamberlain*, 84 Ill. 333; *Bowman v. Venice & C. R. Co.*, 102 Ill. 470; s. c., 14 Am. & Eng. R. R. Cas. 338.

When proceedings to condemn are authorized.

Now, if it be conceded that appellee railway company succeeded to all the rights and privileges of the Illinois South-eastern R. Co. under the charter, will it affect the question under consideration? By the fifth section of its charter, that company was given the right to acquire and hold property for its corporate purposes; and it is provided that, "in case of disagreement as to the right of way, price of land or lands, or other privileges embraced in this section, the same may be condemned," etc., under the eminent-domain laws in force. 2 Priv. Laws, 1867, p. 751.

Succession to rights of Illinois S. E. R. Co. immaterial.

The taking of private property by the exercise of the right of eminent domain is in derogation of common right, and the grant of power for its exercise must be strictly followed.

We have held in numerous cases that the averments in petitions for condemnation need not be in the language of the statute, but that any allegation showing affirmatively that the corporation has been unable to

Petition insufficient—Efforts to purchase.

agree with the land-owner in respect of the compensation to be paid will suffice. *Chicago, B. & Q. R. Co. v. Chamberlain*, 84 Ill. 333; *Bowman v. Venice & C. R. Co.* 102 Ill. 459; s. c., 14 Am. & Eng. R. R. Cas. 338.

But there is in the petition and proof in this case a total want of any reference to the jurisdictional fact of the inability of ap-

appellee railway company to agree with the land-owner as to the compensation to be paid. There seems to have been no effort made to purchase the land, or agree on the compensation or price to be paid therefor, before resorting to this proceeding. The petition was clearly insufficient to give the court jurisdiction or to entitle the appellee company to appropriate appellant's land.

Numerous errors are pointed out in the rulings of the court in modifying the defendant's instructions. Only one is of sufficient importance to require discussion.

The second instruction asked by defendant told the jury, in effect, that the compensation to be paid to the defendant land-owner for the land taken was its value "for any purpose for which it was shown by the evidence to be available." The modification consisted in striking out the words quoted, and confining the value to the worth of the land, "as land, as it is at this time, as shown by the evidence." The modification was improper. The present market value of the land taken furnishes the true basis for determining the compensation to be paid the land-owner for land taken and appropriated to the public use.

This value of the land is to be determined by the jury, from the evidence, either as furnished by the testimony of witnesses or by their personal inspection of the premises; and in so far as its adaptability to uses other than that to which it is applied enhances or fixes its present market value, such uses are competent to be considered by the jury. *Haslain v. Galena & S. W. R. Co.*, 64 Ill. 353; *Chicago & E. R. Co. v. Jacobs*, 110 Ill. 414; s. c., 22 Am. & Eng. R. R. Cas. 97; *Jacksonville & S. E. R. Co. v. Walsh*, 106 Ill. 253; *Dupuis v. Chicago & N. W. R. Co.*, 115 Ill. 98; *Calumet R. R. Co. v. Moore*, 33 Am. & Eng. R. R. Cas. 179.

The judgment of the county court is reversed, and the cause remanded to that court.

Eminent Domain — Market Value of Property Taken as Measure of Damages.—See *Little Rock J. R. Co. v. Woodruff*, 33 Am. & Eng. R. R. Cas. 169 note, 178; *Calumet River R. Co. v. Moore*, 33 lb. 179, note, 184.

Consideration of Uses for which Property is Suitable.—See *Calumet River R. Co. v. Moore*, 33 Am. & Eng. R. R. Cas. 179, note, 184.

ALEXANDER *et al.*

v.

SEARCY *et al.*

(Georgia Supreme Court, January. 23, 1889.)

Corporations—Purchase of Stock—Minority Stockholders—Estoppel in Pais.—Where a corporation purchasing stock of another corporation gives notice to the directors and stockholders of the latter corporation, and regularly votes the stock and expends large sums of money for the benefit of the corporation pursuant to resolutions of the stockholders, the minority stockholders are estopped from claiming, several years after such purchase was made, that the purchasing corporation has procured the mismanagement of the corporation, and from denying that such purchasing corporation has power under its charter to make the purchase.

Railroad Mortgage—Foreclosure—Defence.—Neither the minority stockholders nor one who is not a stockholder at the time of the alleged illegal transactions can maintain a bill in defence of the foreclosure of a railroad mortgage alleging that the affairs of the corporation have been mismanaged in the interest of the principal stockholder, and that the bonds are void for usury, in their negotiation, where no demand has been made upon the directors or stockholders to make such defence, the only excuse for not making the demand being that the officers are in collusion with the plaintiff.

ERROR from Superior Court, Spalding County.

Bill by Searcy and others against Alexander, trustee, etc., and others. Defendants bring error.

Lawton & Cunningham, R. F. Lyon, and John S. Hall for plaintiffs in error.

A. M. Speer, C. Anderson, E. W. Hammond, and F. D. Dismuke for defendants in error.

SIMMONS, J.—It appears from the record in this case that, in the year 1871, the Savannah, Griffin & North Alabama R. Co. made and executed a deed of trust or mortgage on its railroad and other property to William M. Wadley, president of the Central R. & Banking Co. of Georgia, and his successors in office, and William B. Johnston, as trustees, to secure the principal and interest of \$500,000 of bonds which said Savannah, Griffin & North Alabama R. Co. was about to issue. These bonds were issued, and in the course of time the major part of them came into the possession of the Central R. & Banking Co. It further appears that the Savannah, Griffin & North Alabama R. Co. had defaulted in the payment of the interest on

Facts.

these bonds for several years. The deed of trust or mortgage contained a clause authorizing the trustees to foreclose the mortgage in case of such default. Wadley, one of the trustees named in the deed, died, and Alexander, the plaintiff in error here, became his successor as president of said Central R. & Banking Co., and his successor in this trust, under the terms of the mortgage. In 1887 he and Johnston, the other trustee, filed their bill to foreclose this mortgage. Johnston died pending the suit, and Alexander thus became the sole complainant. After the appearance term of the case, and before the trial term, Searcy and others, as stockholders of the Savannah, Griffin & North Alabama R. Co., filed their bill against said Alexander, trustee, the Savannah, Griffin & North Alabama R. Co., and the Central R. & Banking Co., wherein they allege that they are stockholders of the Savannah, Griffin & North Alabama R. Co.; that they own about 400 shares of the capital stock thereof; and that the Central R. & Banking Co. owns a majority of the stock of said Savannah, Griffin & North Alabama R. Co., and likewise the bonds issued by said company as aforesaid. They further allege that, by reason of the Central's ownership of a majority of the stock, it has had the control of the Savannah, Griffin & North Alabama R. since 1872, and by reason of having such control has placed its own directors on the board of directors of the Savannah, Griffin & North Alabama R. Co., and that it has purposely mismanaged said Savannah, Griffin & North Alabama R., by cutting off its through freights, and sending them over the Atlantic & West Point R., a road in which the Central also had an interest; by building a depot in the town of Carrollton much more costly and extensive than the business of the road required; and by placing the net income earned by the Savannah, Griffin and North Alabama R. upon its road-bed in the way of improvements—all of which has greatly injured and damaged the said stockholders of the said Savannah, Griffin and North Alabama R. Co. They also allege that the bonds of the Savannah, Griffin & North Alabama R. Co. were purchased below par by the Macon & Western R. Co. (which, by an act of the legislature, was afterwards consolidated with the Central R. & Banking Co.), which latter company now owns said bonds, and is seeking to recover the full value thereof and interest thereon, besides interest on the unpaid coupons. They allege that the purchase of these bonds at 65 or 70 cents on the dollar was an usurious transaction, and that the Central R. & Banking Co. ought not to be allowed to recover the face value thereof and interest on the same; that, if it can recover at all, it can only be allowed to recover the amount it paid for the bonds, with the legal interest on that amount. They further allege that neither the said Macon & Western R. Co., nor the Cen-

tral, had the power, under their charters, to own or purchase the stock of the Savannah, Griffin & North Alabama R. Co.; that the purchase of said stock was *ultra vires* and void. They also allege that the president of the Central R. & Banking Co. was a director of the Savannah, Griffin & North Alabama R. Co. and was president of the former company when the stock of the Savannah, Griffin & North Alabama R. Co. was sold to it, and that this rendered the contract illegal and void. They prayed for an accounting between the Central and the Savannah, Griffin & North Alabama R. Co. as to the damages incurred by the latter road by reason of the mismanagement thereof; insisting that, when such damages were assessed, they should be credited upon the bonds held by the Central, and that such damages would be sufficient to pay off all the legal interest due on said bonds. They also prayed that an accounting be had as to the usury sought to be collected by the Central, and that the usury be deducted from said bonds, and that the Central be enjoined from disposing of any of said bonds. They prayed the appointment of a receiver to take charge of and manage said Savannah, Griffin & North Alabama R., under the direction of the court. They further prayed that the ownership of the stock of the Savannah, Griffin & North Alabama R. Co. by the Central R. & Banking Co. be decreed to be *ultra vires*, and null and void.

Alexander, the trustee, answered said bill, but it is unnecessary to notice his answer, as it is not material to the decision of this case.

The Central R. & Banking Co. showed cause against the granting of the injunction by demurrer and answer. The second and third grounds of the demurrer are as follows: "Second. Because the complainants do not show by their bill any right to prosecute this suit on behalf of the minority stockholders; it not being alleged that the directors of the Savannah, Griffin & North Alabama R. have ever been requested to make such defence, or that they have ever refused or declined to make such defence. Third. Because the complainants, if they have any cause of complaint or grounds of equity, have not made such complaint within a reasonable time, but have, after full knowledge of all such grounds of complaint, or a full opportunity to acquire notice thereof, acquiesced in such acts of alleged error for more than four years." The answer shows that the complainant Searcy owns 296 shares of the capital stock of the Savannah, Griffin & North Alabama R. Co., which were acquired by him since the beginning of this litigation, and that the other complainants owned their stock from 10 to 15 years before the beginning of the litigation. It denies all the charges made in the bill as to the mismanagement of the road, and in-

sists that the road was managed according to the best judgment of the officers and board of directors thereof. It admits owning the stock and bonds of said railroad, and alleges that the purchase thereof was made by the board of directors of the Central with the full knowledge of all the stockholders of the Savannah, Griffin & North Alabama R. Co.; that the matter was laid before said stockholders by the president of their company; and that by a vote of said stockholders they authorized their said president to sell said bonds and stock to the Central R. & Banking Co., upon certain conditions named in the resolution. The answer also goes into a detailed account of the management of the Savannah, Griffin & North Alabama R., giving the facts as to its management, and the earnings of the road, year by year. It denies that there was any usury in the transaction of the purchase of the bonds, claiming that it did not lend any money to the Savannah, Griffin & North Alabama R. Co.; that the bonds were purchased by it in open market, and the full market price paid therefor. Under the view we take of this case, it is unnecessary to go further into the details of the answer.

On the hearing, the chancellor granted the injunction prayed for, and appointed a receiver to take charge of the Savannah, Griffin & North Alabama R. To this decision Alexander, the trustee, the Savannah, Griffin & North Alabama R. Co., and the Central R. and Banking Co. excepted.

1. We think the court erred in granting this injunction, and appointing a receiver. The record shows that the alleged illegal transactions complained of by these minority stockholders commenced in 1870, and continued from that time up to the filing of the bill. A part of this stock was purchased by the Macon & Western R. Co. prior to 1870. Reports were made of the sale by the president of the Savannah, Griffin & North Alabama R. Co. to the board of directors and the stockholders thereof. The purchase by the Central R. & Banking Co. was made subsequently, and of this purchase the board of directors and the stockholders of the Savannah, Griffin & North Alabama R. Co. were also notified at the annual meetings of the stockholders. The transfers of the stock to the Macon & Western R. Co. and the Central R. and Banking Co. were made on the books of the company, to which every stockholder had access. This stock was voted at the annual meetings by the Macon & Western R. Co., and, when the Macon & Western was consolidated with the Central, the same stock, and other stock purchased by the Central, were voted at several annual meetings of the Central; so that there can be no doubt that each and every stockholder of the Savannah, Griffin & North Alabama R. Co. had full knowledge that the Central R. & Banking Co. owned the stock, and

Stockholders
estopped by
their silence
and inaction.

that it voted it at every meeting of the stockholders. The exercise of this right commenced on the part of the Central as early as the year 1873, and from that time to November, 1887, it claimed and exercised the right to vote this stock. The Macon & Western R. Co. and the Central R. and Banking Co. have expended large sums of money in building and equipping the Savannah, Griffin & North Alabama R.; yet these stockholders at each meeting, when these facts were laid before them, kept silent. They made no objection to receiving this money from the Macon & Western R. Co. and the Central R. & Banking Co., but agreed in every instance to accept their money. They stood by and saw the Central expend large sums in building and equipping this road, and yet not a word of objection did they utter. They stood by and saw this stock issued to the Macon & Western R. Co., and to the Central, in payment of large sums of money advanced to them by these companies, and not only stood by and saw this done, but helped by their votes to do it; because, as said before, it was all done by resolution of the stockholders at their meetings.

In our opinion, whether the Macon & Western, or the Central after the Macon & Western was consolidated with it, had power and authority, under their charters, or not, to purchase and own stock in another railroad company, these stockholders cannot now complain. They have acquiesced in this illegal act, if it is illegal, in some instances for seven <sup>Same—Author-
ities.</sup> years, and in others for fifteen, the stock having been purchased at divers times from 1869 to 1880. They have received the money of these corporations, and after acquiescence for that length of time, with a full knowledge of the facts, equity will not allow them to complain. This is a familiar doctrine in courts of equity. Cook, Stocks, § 686, says: "After a stockholder has knowledge, or is chargeable with knowledge, of an *ultra vires*, fraudulent, or negligent act of the directors, he must institute his suit, if at all, within a reasonable time thereafter. As to what will constitute a reasonable time depends on the circumstances of the case. If it is evident that the stockholder is waiting to see whether the unauthorized act will be profitable to the corporation, the court will refuse to grant him any relief. So, also, if the stockholder, after a full knowledge of the facts, stands by and allows large operations to be completed, or money expended, or alterations to be made, before he brings suits, he is guilty of laches, and his remedy is barred. In like manner, where the stockholder, with full knowledge, has accepted the benefit of the act, he cannot complain thereafter; and in general, where it is clear that the stockholder had a full knowledge of all the essential facts of an act which he might bring a suit to remedy, but which, for an unreasonable length of time, he fails to

object to by a bill in equity, he will be held guilty of laches, and his right to institute the suit is barred." In *Taylor v. Railway Co.*, 4 Woods, 575, the court says: "A stockholder of a corporation will not be allowed, after a reasonable time, to disturb and rescind a contract made by his corporation, after the same has been fully executed, on the ground that it is *ultra vires*, and in excess of the corporate powers granted by the charter of the corporation." In the case of *Railway Co. v. Railway Co.*, 3 De Gex, M. & G. 341 (1853), it is said: "Where the summary interference of this court is invoked in cases of this nature, it must be invoked promptly. Parties who have lain by and permitted a large expenditure to be made, in contravention of the rights for which they contend, cannot call upon this court for its summary interference." In *Stewart v. Transportation Co.*, 17 Minn. 372 (Gil. 348), the court said: "If a stockholder assents to acts *ultra vires*, or, although not originally or expressly assenting, has for an unreasonable time acquiesced, and has permitted them to go unquestioned, so that other parties, who have acted upon the faith of them (as, for instance, by making large expenditures of money), would suffer great injury from their repudiation, a court of equity would not easily be induced to grant relief at the instance of such stockholder." In the case of *Peabody v. Flint*, 88 Mass. 54, a delay of three and a half years was held to be a bar. In the case of *Gregory v. Patchett*, 33 Beav. 595, six years were held to be a bar. In the case of *Ashurst's Appeal*, 60 Pa. St. 290, seven years were held to be a bar. In the case of *Dimpfell v. Railroad Co.*, 110 U. S. 209; s. c., 16 Am. & Eng. R. R. Cas. 461, three years and eight months were held to be a bar. The general rule which we deduce from these authorities, and others which we might cite, is that while a minority of the stockholders of a corporation may maintain a bill in equity in behalf of themselves and other stockholders, for fraud, conspiracy, or acts *ultra vires*, against the corporation, its officers, and others who participate therein, when the minority stockholders have been injured or damaged by said acts, they must act promptly, and not wait an unreasonable length of time. If they postpone their complaint for an unreasonable time, they forfeit their right to equitable relief. "Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing." *Smith v. Clay*, 3 Brown, Ch. 639, note. This view is not in conflict with the case of *Railroad Co. v. Collins*, 40 Ga. 582, and *Hazlehurst v. Railroad Co.*, 43 Ga. 13, cited in the argument, as the stockholders in these cases filed their bill promptly.

But it is alleged by counsel for the defendants in error that

no amount of acquiescence on the part of the stockholders will make an act legal which is illegal; in other words, that no amount of acquiescence on the part of the stockholders would give power to the Central R. & Banking Co. to purchase and own stock in another railroad, if the law did not authorize it. We concede that. But in our opinion it does not follow that, because a railroad company has no power to purchase or own stock in another railroad company, a stockholder who has acquiesced therein for fifteen years should have a right to object. It may be true, and doubtless is, that no assent or acquiescence of the stockholders can validate such an act; but it is a different question whether, after such a long acquiescence, the stockholder may take advantage of the invalidity of such acts. Cook, Stocks, § 683. The act of purchasing and owning and voting stock in one railroad company by another railroad company may be *ultra vires* so far as the public are concerned; but we do not think that a stockholder who has acquiesced for fifteen years, and who has received money from the corporation by reason of the illegal act, should be allowed to make that question. His acquiescence does not render valid the illegal act of the corporation, but will prevent him from taking advantage of its invalidity. The public or the state is not thus bound. The state, through its proper officer, may at any time commence proceedings to prevent it, or to declare it *ultra vires* and illegal.

Consenting stockholder cannot take advantage of illegal act.

2. We think the chancellor erred in granting this injunction for another reason. This is a bill filed by a few persons, owning about 400 shares out of the 10,000 shares constituting the capital stock of this company. The Central R. & Banking Co. owes somewhat over 6000 shares of the capital stock, and the remainder of the shares is owned by individuals. The general rule of law is that the holders of a majority of the stock shall control the corporation, and the minority cannot interfere therewith unless they show some good reason for interference. These complainants nowhere allege in their bill that they ever made a demand on the board of directors to defend this suit, or that the board of directors had refused to defend it. Nowhere in their bill do they set up any excuse or reason for filing the same, except that they say they would have called on the officials in charge of the Savannah, Griffin & North Alabama R. to make a defence to said foreclosure proceedings but for the facts aforesaid, which show that they were in collusion with the parties seeking to foreclose the mortgage, and in order to make such defence they would have to accuse themselves of misconduct and fraud on the rights of the complainants. They do not allege that they applied to the board of directors or to

Stockholders cannot maintain bill in defence of foreclosure proceedings.

the stockholders, but that it was the officials of the road to whom they would have applied, if they had not been in collusion with the Central R. & Banking Co. That is not sufficient, in our opinion. The rule is well settled by a great number of adjudicated cases in the highest courts; among them, in the able opinion of Mr. Justice Miller in *Hawes v. Oakland*, 104 U. S. 450, where it is held that, before a minority of the stockholders can maintain a bill against the majority, there must be shown (1) some action, or threatened action, of the directors or trustees which is beyond the authority conferred by the charter, or the law under which the company was organized; or (2) such a fraudulent transaction, completed or threatened by them, either among themselves or with some other party, or with shareholders, as will result in serious injury to the company or the other shareholders; or (3) that the directors, or a majority of them, are acting for their own interests, in a manner destructive of the company, or of the rights of the other shareholders; or (4) that the majority of the stockholders are oppressively and illegally pursuing, in the name of the company, a course in violation of the rights of the other shareholders, which can only be restrained by a court of equity; and (5) it must also be made to appear that the complainant made an earnest effort to obtain redress at the hands of the directors and shareholders of the corporation, etc. In the opinion of the court the learned justice says: "But, in addition to the existence of grievances which call for this kind of relief, it is equally important that, before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body in the matter of which he complains; and he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity." This case was cited and approved in *Dimpfel v. Railroad Co.*, 110 U. S. 209; s. c., 16 Am. & Eng. R. R. Cas. 461, where Mr. Justice Field, in delivering the opinion of the court, says: "A stockholder must make a better showing of wrongs which he has suffered,

and also of efforts to obtain relief against them, before a court of equity will interfere and set aside the transactions of a railway company, or of its directors. It is not enough that there may be a doubt as to the authority of the directors, or as to the wisdom of their proceedings. Grievances, real and substantial, must exist; and before an individual stockholder can be heard, he must show, in the language of this court, that 'he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances or action in conformity to his wishes;' citing *Hawes v. Oakland*, *supra*. In that case the court added that the efforts to induce such action as he desired on the part of the directors, or of the stockholders when that was necessary, and the cause of his failure, should be stated with particularity in his bill of complaint, accompanied with an allegation that he was a stockholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law."

We have shown that no allegations of this sort were made by the complainants in this case. As said before, no request or demand was made of the directors, and no reason is given why such demand was not made of the directors. No reason was stated in this bill why they should be entitled to file it, except that the officers of the Savannah, Griffin & North Alabama R. Co. were in collusion with the officers of the Central R. & Banking Co. It seems to us that if they had applied to men of such character and standing as those who constituted their board of directors, viz., John D. Stewart, U. B. Wilkinson, A. D. Freeman, W. W. Merrill, J. U. Horne, H. J. Sargent, W. W. Fitts, and Arthur Hutchinson, and had even intimated wrongful and fraudulent acts on the part of the Central R. & Banking Co., and had asked them to investigate the matter, they would certainly have done so. But they fail to allege that they called on these men to do their duty as directors over this separate and independent organization, and simply allege, in effect, that they were mere puppets of the Central R. & Banking Co. We are satisfied that if these defences to the foreclosure of the mortgage have any merit in them, and these complainants show any good reason to the directors why they should do so, they will make a defence.

3. There is one other reason, to my mind, why these complainants should be held to strict allegations in their bill; and that is the fact, already stated, that, out of the 10,000 shares of capital stock in this company, they own only about 400. The holders of between three and four thousand shares, who are not connected with the Central R. & Banking Co., as appears from this record, make no complaint against the foreclosure of the

Stockholder
must own
stock at time
of transaction.

mortgage; and, of the holders of these 400 shares who do make complaint, one of them owns nearly 300 shares, and the record discloses that he purchased them after this litigation began. The weight of authority seems to be that a person who did not own stock at the time of the transactions complained of cannot complain or bring a suit to have them declared illegal. In the case of *Hawes v. Oakland*, *supra*, it is said that the bill must allege that the complainant was a shareholder at the time of the transaction of which he complains, or that his shares have devolved on him since by operation of law. And this is reiterated in *Dimpfel v. Railroad Co.*, *supra*, in which case Mr. Justice Field says, in speaking of the complainant's efforts to induce the directors or stockholders of the corporation to begin suit: "The cause of his failure should be stated with particularity in his bill of complaint, accompanied with an allegation that he was a stockholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law." See, *contra*, *Wait, Insolv. Corp.* § 628, and authorities there cited. We therefore hold that these minority stockholders who filed this bill, not having applied to the directors of the railroad company, of which they are stockholders, nor given any reason for their failure to make this application to the directors or stockholders to defend these suits, cannot, of their own motion, make these defences, either on account of the mismanagement of the road, or on account of the usury of the transaction, if there be any usury. Judgment reversed.

Rights of Minority Stockholders.—See note, 25 Am. & Eng. R. R. Cas. 13; *Mills v. Central R. Co.*, 24 Ib. 47, note, 56; *McHenry v. New York, etc., R. Co.*, 22 Ib. 50, note, 53; *Metropolitan El. R. Co. v. Manhattan R. Co.*, 15 Ib. 1; *Leo v. Union Pac. R. Co.*, 16 Ib. 452; *Du Pont v. Northern Pac. R. Co.*, 16 Ib. 456, note, 461; *Dimpfel v. Ohio, etc., R. Co.*, 16 Ib. 461; *Pacific Railroad v. Missouri Pac. R. Co.*, 6 Ib. 621; *Elkins v. C. & A. R. Co.*, 9 Ib. 590.

APPEAL OF HARRISBURG AND EASTERN R. CO.

(Pennsylvania Supreme Court. October 1, 1888.)

Railways — Mortgage Foreclosure — Necessary Parties — Service. — The bondholders are necessary parties to a suit brought to adjudge void a mortgage, and the bonds secured thereby, given by a corporation. Service of process on trustees is not sufficient to bind them.

APPEAL from Court of Common Pleas, Dauphin County.

Bill by the Harrisburg & Eastern R. Co. against the Pennsylvania & New England R. Co., George M. McPherran and Pierce C. De Saque, trustees, to have declared void a mortgage given by the respondent corporation to the trustees, and the bonds to secure which it was given, and for other relief. The defendants failing to appear, the bill was taken *pro confesso* and a master appointed, who reported recommending the decree for which complainant prayed. From the refusal of the court to grant this relief the complainant appeals.

Henry Trumbore for appellant.

GREEN, J.—It is scarcely necessary to add anything to what has been so well said by the learned court below. The proceeding is aimed directly against the bonds in question, and of course assails necessarily the rights of the persons who hold them. The trustees hold their office for the benefit and protection of the bondholders, but cannot be regarded as their representatives for all purposes. Of course, if they were, if the relations between them were such as to constitute the trustees general agents or attorneys in fact in all matters relating to the bonds, so that service of process in adverse proceedings would be binding upon the bondholders, when made only upon the trustees, the contention of the appellant might be sustained. But there is nothing on the record showing the existence of such a relation. As trustees only, they are the mere custodians of the legal title to the bonds for the benefit and advantage of the persons who own them. There is nothing in that relation which makes them general agents for the bondholders as to all matters affecting the bonds. The right of the latter to own the bonds and to defend the validity of the bonds is a right which is personal to the owners of the bonds. Whenever that right is assailed, they have an undoubted right to protect themselves and their title in their own persons and by their own counsel. It may be conceded that for many purposes the trustees do represent the bondholders; and, whenever they do, the latter are bound by their acts. The authorities cited for

**Bondholders
necessary
parties.**

the appellant do not reach to the position that in a proceeding such as this, which attacks the very validity of the bonds, the trustees may be substituted as defendants, and process served on them, so as to obligate the bondholders by all the consequences of an adverse proceeding and judgment. In the absence of clear and satisfactory authority for a ruling to that effect, we are unwilling to take such a step. It is true the appellant may be subject to some inconvenience in ascertaining who are the holders of the bonds; but that difficulty is not insuperable. As against the consequences which might result from allowing an adverse judgment to be taken against persons who have had no notice and have never had a day in court, it is not to be considered. Decree affirmed.

Railways—Mortgage Foreclosure—Necessary Parties.—As to necessary parties on a bill in equity brought by the trustees of a railroad for the foreclosure of a mortgage, see *Bardstown & L. R. Co. v. Metcalf*, 4 Met. (Ky.) 199; *First National Fire Ins. Co. v. Salisbury*, 130 Mass. 383; 4 Am. & Eng. R. R. Cas. 480; *Shaw v. Norfolk R. Co.*, 71 Mass. (5 Gray), 162; *Williamson v. New Jersey Southern R. Co.*, 25 N. J. Eq. (10 C. E. Gr.) 13; *Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co.*, 106 N. Y. 673; s. c., 43 Hun (N. Y.), 521; *Hand v. Savannah & C. R. Co.*, 13 S. C. 467; *Meier v. Kansas Pac. R. Co.*, 4 Dill. C. C., 378; *Scott v. Mansfield, C. & L. M. R. Co.*, 2 Flipp. C. C. 15.

It seems that in actions to foreclose a railroad mortgage given to a trustee to secure the bonds of the railroad, the holders of such bonds need not be made parties to the action. *Shaw v. Little Rock & Ft. S. R. Co.*, 100 U. S. (10 Otto) 605; bk. 25, L. ed. 757; *Chicago, R. I. & P. R. Co. v. Howard*, 47 U. S. (7 Wall.) 392; bk. 19, L. ed. 117; *Vose v. Bronson*, 73 U. S. (6 Wall.) 452; bk. 18, L. ed. 846.

For a full discussion of the question of necessary parties, plaintiffs and defendants, see *Wiltsie on Mortgage Foreclosure*, ch. 5 to 11, both inclusive.

KNOLL, Administrator,

v.

NEW YORK, CHICAGO AND ST. LOUIS R. Co.

(Pennsylvania Supreme Court, October 1, 1888.)

Railway Companies—Mortgages of Road—Action for Injury to Property.—An action will not lie at the instance of a holder of a mortgage as trustee against a third person for injuries to the premises, if they remain of greater value than the amount due on the mortgage, and for which the trustee is liable to account.

Same—Consequential Injuries—Settlement by Mortgagor.—Consequential injuries to mortgaged premises resulting from the construction of a rail-

road, damages for which have been amicably settled in good faith by the mortgagor with the company, cannot be recovered by the mortgagee.

ERROR to review a judgment of compulsory nonsuit in an action on the case.

The error assigned was the action of the court in discharging a rule to show cause why the nonsuit should not be taken off.

The object of the action and the question presented are sufficiently set forth in the opinion.

J. W. Wetmore for plaintiff in error.

Davenport & Griffith for defendant in error.

WILLIAMS, J.—This case is somewhat anomalous. The plaintiff is the holder of a mortgage upon a house and lot in the city of Erie. The defendant company, acting Facts. under the authority of the railroad laws of the commonwealth and an ordinance of the city of Erie has built a single-track railroad along the centre of Nineteenth street, on which the mortgaged property fronts. The complaint of the plaintiff is that the value of the property has been depreciated by the building of the railroad along the street, and that his security as a mortgage creditor has been impaired to the same extent. No effort has been made to collect the debt or to bring the mortgaged premises to sale, so as to determine what amount could be realized out of it; but this suit is brought to recover in damages the amount of the alleged depreciation in the value of the property.

From an examination of the testimony we learn that the plaintiff is the administrator of W. Hermle, deceased, who died in 1872. At the time of his death Hermle was the owner of the equitable title to the lot in question and had erected the dwelling-house now standing on it. He left a widow to survive him, but, so far as the evidence informs us, no issue. Soon after his appointment as administrator Knoll made his application to the orphans' court for leave to sell the house and lot at public sale for the payment of debts. Leave was granted, the sale made, and Mrs. Hermle, the widow, became the purchaser at the price of \$2000. She paid no part of the purchase money, but gave her bond and mortgage for the amount of her bid, and this is the bond and mortgage which Knoll alleges is impaired in value by the act of the defendant in building its road along Nineteenth street. The mortgage was made in 1873, the railroad was located in 1881, and this suit was brought in 1887. Our first question is whether the amount due upon the mortgage is greater than the present value of the property bound by it, after providing for a prior incumbrance. If it is not, the plaintiff has nothing of which to complain. The question is not whether the property is worth less than it was when the mortgage was taken,

Whether mortgage debt is greater than value of property.

but whether it is worth less than the plaintiff's debt. It is the injury to him, not that sustained by the lot-owner, on which his right to recover must rest. It must be borne in mind that the plaintiff is a mere trustee. As administrator of W. Hermle, he holds this mortgage for those who may be entitled to the fund on final settlement of the estate, and these after the lapse of fifteen years are presumably not creditors, but the heirs at law, of the decedent.

In 1877 the plaintiff filed a partial account of his administration of the estate, from which it appears that the personal estate was appraised at \$69.80 and was retained by the widow as part of the amount allowed her as exempt from the claims of creditors. The decedent had no real estate except the house and lot now owned by his widow and represented by plaintiff's mortgage. The account also shows that Mrs. Hermle had paid, to apply on the mortgage, "in money and debts assigned to her," the sum of \$1350, with which the accountant charged himself. This left \$650 of the principal still due, with some interest. Whose was this balance? Out of it Mrs. Hermle was entitled to take the balance of her \$300 as of the date of the mortgage. This would take \$230 from the \$650, leaving only \$420 for distribution; and in the absence of issue one half of this balance would belong to her under the intestate laws. The amount to which the plaintiff would be entitled as administrator would be in this manner reduced to about \$200, a sum which, under the evidence, would be abundantly secure upon the property. As to Mrs. Hermle's interest in the mortgage, she is very clearly estopped from making any claim against the defendant because she agreed with the defendant that the damages sustained by the property were \$200, and upon the payment of this sum to her she executed and delivered a release of all claims for damages by reason of the location of the railroad on Nineteenth street. As she could not now claim a larger sum than that agreed upon, Knoll cannot claim it for her, but must be regarded as the representative of the other parties entitled to share in the fund. He fails to show, therefore, that his security has been impaired for the sum he is entitled to collect from Mrs. Hermle upon the mortgage, and for this reason alone the court below was justified in withdrawing the case from the jury.

But while indicating a sufficient reason for affirming the judgment in this case, we have no inclination to avoid the consideration of the precise point on which the case turned in the court below, and which has been presented here with so much earnestness and zeal by the learned counsel for the plaintiff in error. Is the plaintiff, on the assumption that his security has been impaired, in a position to maintain this action against the com-

Right to sue
for impair-
ment of mort-
gage security.

pany defendant? The title to the property injured is in Mrs. Hermle the owner. The plaintiff is a mortgagee out of possession, a holder of an incumbrance upon the title merely. As a lien creditor he has the right to prevent the depreciation of the property bound by his judgment or mortgage by the commission of waste thereon. If the owner, or stranger to the title, attempts the removal or destruction of timber trees, of the minerals or the buildings, he may interfere by writ of estrepement or injunction to prevent it; but, subject to this right of the lien creditor to stay waste, the owner has by virtue of his ownership the *jus disponendi* of the property, including everything upon the surface or underlying it. He may lawfully sell his timber or his buildings; and if the vendee is allowed to remove them, a good title will vest in him, provided always that the sale be fairly and honestly made. The creditor has the right to interpose if he will; but if he does not do so, the several articles pass out from under his lien when they pass beyond the lines of the property on which his lien rests. While on or affixed to the freehold he may insist that they shall so remain; but if severed and removed, his right to them by virtue of his lien on the freehold is gone. Vigilance is the duty of a creditor. *Vigilantibus non dormientibus jura subveniunt.*

But the injury complained of in this case is not waste. The defendant company has not entered upon the lot covered by the mortgage, or removed anything from it. It has entered upon a public highway in a lawful manner and in the exercise of the right of eminent domain. Its entry could not have been prevented by the plaintiff, nor its work arrested by a writ of estrepement or injunction. The plaintiff alleges that the value of the property bound by his lien has been diminished by the construction of the railroad. So it might have been by the erection of a factory or a tavern on a neighboring lot, or by a change in the use or occupancy of the buildings near it; but so long as there is no entry upon the lot bound by the lien, and no unlawful act done by the defendant, the plaintiff has no ground on which to stand. The right of action for such consequential injuries is in the owner; and if the party exercising the right of eminent domain desires to make an amicable settlement for any damages done thereby, the owner residing on the land is the proper person to whom to apply.

The injury is one done to the freehold as the result of the lawful act of another, done beyond the lines of the injured property, and the owner of the freehold is the only person in whom a right of action for such an injury can reside. If the owner should refuse to move, or should act fraudulently, the courts, upon a proper application by lien creditors, would no doubt treat him as a trustee, and require him to do, or permit

his creditors to do in his name, what might be necessary to an adjustment of the damages, and impound the money for those equitably entitled to receive it.

In this case the owner has settled with the defendant and given a release of damages. There is no allegation that the settlement was secured by fraud on the part of the defendant, or made by the owner with a purpose to defraud the plaintiff. The plaintiff brings his suit upon a right of action which he alleges rests in him as a lien creditor. Notwithstanding the settlement and release by the owner, he claims to be entitled to recover his damages, as distinguished from the damages of the owner. The right of action asserted is not that of the owner of the property, but one independent of and additional to that which resides in the owner. If this position is tenable for the plaintiff, it would be equally so for any number of lien creditors of Mrs. Hermle. A settlement with, or a recovery by, one would not estop another from taking the chances of a more favorable verdict. To state the position is a sufficient argument against its soundness.

Perhaps the case that comes nearest to our question is *Re Road in Upper Dublin & Whitmarsh Twp.* reported in 94 Pa. 126. A public road had been laid out over a farm in Montgomery county, of which Bissinger was owner, but upon which Nash held a purchase-money mortgage for \$10,000. Nash claimed to be entitled to the damages sustained by the opening of the road, as the holder of the mortgage. On the other hand, Bissinger, as owner, released them. The court of quarter sessions held the release of the owner effectual as an extinguishment of all claim for damages. The judgment was affirmed by this court with a *per curiam* opinion, in which the following paragraph occurs: "Nash might, perhaps, have brought his case on the record by a petition with the necessary averments; but as it stands, we cannot take cognizance of the question he has attempted to raise." If by "necessary averments" Nash had shown to the court that Bissinger was acting in bad faith towards him, and was releasing the damages, not because the advantages resulting from the opening of the road were in his opinion equal to or greater than the disadvantages, but to prevent Nash from securing them to apply upon his mortgage, then it is probable that the court of quarter sessions would have entertained his petition and made such order as to secure a fair ascertainment of the damages and a proper appropriation of them.

The claim asserted, however, would have been that of the owner, and the damages, when settled, would have been paid out under an order of the court. Action analogous to that now suggested has been taken in right-of-way cases whenever the courts have obtained control over the damages assessed, and distribution has been made on equitable principles. *Powell v.*

Whitaker, 88 Pa. 445 ; Workman v. Mifflin, 30 Pa. 362. In these cases the courts seem to have regarded the owner as a trustee for his lien creditors, and a recovery in his name as one to be controlled for their benefit.

In the case at bar, if appraisers had been appointed in lieu of the settlement made between the parties, they would have made report, not only fixing the amount of the damages, but stating the fact that the plaintiff was the holder of an unsatisfied mortgage, and recommending the money to be paid into court for the benefit of the parties entitled. If this had been done the plaintiff might have asked that the money be paid to him upon his mortgage ; but if the appraisers had made no mention of the mortgage, and their report had been approved and the money paid to Mrs. Hermle without the intervention or objection of the plaintiff, such payment would have been, as to the defendant, a final disposition of the claim for damages. An agreement upon the amount of damages, made with the owner in good faith, followed by payment to, and a release by him, is equally conclusive upon the claim.

There was, it will be remembered, no entry upon the lot in controversy ; no appropriation of any part of it or of anything upon or affixed to it ; and as a settlement fairly made with the owner was, as we have seen, a final disposition of the claim for damages, it follows that the plaintiff has no further remedy. Had the road been located over any portion of this lot, and had the damages been settled by the parties or adjusted without notice to the plaintiff, it is probable that the lien of the mortgage would not be divested, and the mortgagee might in that case proceed upon his mortgage in the same manner as if a sale of part of the mortgaged premises had been made to a private person, selling first that which still belonged to the debtor, and, if his money was not made thereby, then selling that which the railroad company had taken.

If such had been the situation the plaintiff would have had two remedies at his command : one through the owner, as a trustee of the title for his lien creditors, and one as mortgagee, to be made effective by process upon his mortgage.

In the case in hand the plaintiff had the first of these remedies only, and that was extinguished by the settlement with and release by the owner. We conclude that the plaintiff's counsel entertained substantially this view of the case, for upon the trial he offered, and asked that his offer be entered upon the stenographer's notes of the trial, that the \$200 paid by the defendant to Mrs. Hermle might be credited upon whatever sum the jury might assess the damages to his client. This was a concession that the payment to the owner was satisfaction *pro tanto* of the damages sustained by the property. But if the

payment to the owner was a satisfaction to any extent whatever, it was a satisfaction *in toto*. It was as broad as her right as owner; and as it concluded her, it must necessarily conclude all persons claiming through her. The court below was therefore right in the legal rule applied, and upon which the compulsory nonsuit was entered.

Judgment affirmed.

STERRETT and CLARK, J.J., dissent.

Railway Mortgages—Injury to Property—Remedy of Mortgagee.—A mortgagee of railway property is not entitled to maintain an action for damages to the mortgaged property, except in those instances where the remainder of the mortgage security and the personal responsibility of the mortgagor are sufficient to afford him complete indemnity; and in any instance he will be limited in his recovery to the actual amount of damages which he has suffered. *Southworth v. Vanpelt*, 3 Barb. (N. Y.) 347, cited in *Thomas, Mort.* 56; *Gardner v. Heartt*, 3 Den. (N. Y.) 232; *Lane v. Hitchcock*, 14 Johns. (N. Y.) 213; *Levy v. New York*, 3 Robt. (N. Y.) 194.

PEOPLE *ex rel.* SCHURZ *et al.* v. COOK *et al.*

PEOPLE *ex rel.* MARTENS v. COOK *et al.*

(*New York Court of Appeals*, Oct. 2, 1888.)

Corporations—Taxation of Stock—Constitutional Inhibition.—New York laws of 1886, ch. 143, providing for the taxation of stock corporations for the privilege of organizing is not in its application to corporations framed under earlier laws providing that purchasers at mortgage foreclosure sales can become incorporated bodies, a violation of the constitutional inhibition against laws impairing the obligation of contracts.

Same—Railroads—Sale under Mortgage—Reorganization.—The laws of 1886 apply to corporations formed by the reorganization of railroads sold under mortgage foreclosure.

THE relators appeal from orders of the General Term of the Supreme Court, Third Department (See 47 Hun, 467), affirming orders of the Albany Special Term, denying motions for writs of mandamus to compel the Secretary of State to receive and file certain certificates of articles of association under the Railroad Reorganization Acts.

The facts and questions presented are stated in the opinion.

George Zabriskie for appellants.

Charles F. Tabor, Atty.-Gen. for respondent.

PECKHAM, J.—The question arising is the same in both of the above cases, which were argued together, and the facts

stated are those specially pertaining to the case which is first above entitled.

Certain railroad corporations, properly organized under the laws of this state, duly executed mortgages upon their respective properties and franchises. Subsequently thereto they were consolidated under the provisions of certain consolidation acts of the legislature of this state, not material to be further referred to in detail. After such consolidation, the company thus formed also duly executed its mortgage for securing the payment of its bonds therewith issued.

Facts.

Default was made in the payment of the bonds issued under each of these various mortgages, and foreclosure proceedings were taken therein and the mortgages duly foreclosed, and the whole properties and franchises of all the companies were duly sold under such foreclosure proceedings and bid in by the relators, who thereupon proceeded to form a corporation under the reorganization acts of the legislature of this state, and known as chapter 430 of the Laws of 1874, and chapter 446 of the Laws of 1876, the latter being an amendment of the former act.

Pursuant to its provisions the purchasers agreed upon and executed articles of association; and as the act provided that a certificate of such articles should be filed in the office of the secretary of state before the parties forming the organization should become a body corporate, the relators applied to the defendant as secretary of state to file the same, at the same time tendering to him the proper amount of fees for recording it.

The secretary refused to permit it to be filed, and based his refusal upon the provisions of the act known as chapter 143 of the Laws of 1886, which provided that every corporation incorporated under any general or special law of the state, having capital stock divided into shares, should pay to the state treasurer, for the use of the state, a tax of one eighth of one per centum upon the amount of capital stock which the corporation was authorized to have, and the tax was to be paid upon the incorporation of the corporation, which should have and exercise no corporate powers until the tax was paid; and the secretary of state and all county clerks were prohibited from filing any certificate of articles of association, and from giving any certificate to any such corporation, until they were satisfied that the tax had been paid into the state treasury. It was conceded that this tax had not been paid, and the secretary therefore refused to file the certificate.

The counsel for the appellants claim that the act of 1886 applies only to cases where the state grants franchises to a corporation, and it was stated that none was granted in such a case as this. They also argued that the Reorganization Act of 1874, as amended in 1876, in such a

Appellants' contentions.

case as this, simply continued or revived the franchises of the old corporation under the same charter and with the same immunities and rights held by the former company. Lastly, they claimed that if the act of 1886 was held to apply to this case, it was unconstitutional, as violating the provision of the federal constitution that no state should pass any law impairing the obligation of contracts.

We think none of the claims are well founded. The act by its terms applies to every corporation, and the tax is payable upon its incorporation; and hence it cannot be restricted in its meaning to those cases only in which the state directly grants some franchise to a corporation other than the franchise to be a corporation. There is nothing in the context which should so restrict the provisions of the act, and there is no view of the question in which such a narrow construction could be even plausibly maintained, as against the plain language of the law.

We think it is also plain that under the reorganization acts above mentioned, when the purchasers at the foreclosure sale undertake to reorganize under those acts, and for that purpose to file in the secretary's office a certificate, upon the filing of which they become a body politic and corporate, the corporation thus formed is a new and an entirely different one from that whose property and franchises the purchasers may have bought under the foreclosure proceedings. It is true that the corporation about to be formed by the filing of the certificate has, by force of the statute, when formed, all the rights, franchises, powers, privileges, and immunities which were possessed before such sale by the corporation whose property was sold; but that does not make the corporation the same by any means. The right to be a corporation, which the old corporation had, was not mortgaged and was not sold, and did not pass to the purchasers, and they only obtain such a right upon filing the certificate mentioned, and then they obtain it by direct grant from the state, and not in any degree by the sale and purchase of the franchises, etc., of the old corporation.

The last ground argued by counsel is, we think, equally untenable. There has been no violation of any contract. These mortgages, it is true, were all executed and the bonds issued long prior to the passage of the tax act of 1886, already mentioned. The franchises of the corporations were duly mortgaged under the provisions of state laws, by which it was provided that purchasers at foreclosure sales under such mortgages could, upon compliance with the law, file certificates and become incorporated bodies. But such acts were in no sense contracts, on the part of the state, with persons

Act applies to all corporations.

Reorganization creates new corporation.

No contract violated.

purchasing bonds secured by such mortgages, or with future possible purchasers at foreclosure sales, that the provisions existing at the time of the mortgaging of the franchises for the incorporation of such purchasers should remain the same. I think this question has been decided in this way by the supreme court of the United States, and further discussion of it is unnecessary. See *Memphis & L. R. R. Co. v. Berry*, 112 U. S. 609.

Whether the money exacted by the state on the incorporation of corporations, etc., is a tax in the strict and limited sense of that word, or not, is of no importance. It is a condition imposed by the state in the exercise of its undoubted power, upon the payment of which the certificate may be filed.

The orders of the special and general terms are right, and should be affirmed, with costs.

All concur.

Taxation of Reorganized Railroad Corporations.—See *State v. Montclair, etc., R. Co.*, 13 Am. & Eng. R. R. Cas., 390; *Cooper v. Corbin*, 13 Ib. 394; *State v. Nashville, etc., R. Co.*, 17 Ib. 420.

MERCANTILE TRUST CO. OF THE CITY OF NEW YORK

v.

MISSOURI, K. AND T. R. CO.

(36 *Fed. Rep.* 221.)

Railroad Mortgages—Foreclosure—Appointment of Receiver.—Where a railroad 1600 miles long is mortgaged for \$28,000 a mile the interest in arrear being \$1,000,000 and the business being on the decrease and apparently liable to further decrease, there being a lack of harmony as to its management among the owners, a receiver will be appointed upon a foreclosure under a second mortgage.

Same—Stipulations as to Entry by Trustee on Default—Foreclosure by Action.—A railroad mortgage one of the articles of which provides for entry by the trustees, not to be made until six months after default and demand of payment; another article providing for sale by advertisement, containing the same limitation as to the time, followed by a paragraph providing that "its provision is cumulative to the ordinary remedies of foreclosure in the courts upon default being made as aforesaid," may be foreclosed without waiting six months after default.

Same—Default in Payment of Interest—Foreclosure on.—In the absence of any special provision therefor, a mortgage as security for interest as well as principal may be foreclosed on default in payment of the interest.

IN Equity.

Bill by the Mercantile Trust Company of New York, trustee

for certain bondholders secured by a mortgage on the property of the Missouri, Kansas & Texas R. Co., against said company and the Missouri Pacific R. Co., to foreclose the mortgage, and appoint a receiver.

Alexander & Green, Thos. H. Hubbard, John J. McCook, and William N. Cromwell for complainant.

Simon Sterne, Charles F. Beach, Jr., James O. Broadhead, and L. B. Wheat for defendants.

BREWER, J.—In this case, I have had no opportunity to write out the conclusions to which I have come, nor, for that matter, to arrange my thoughts in any very orderly and systematic manner. I should have preferred to take a little further time to put in better shape what I have to say; yet, aware of the fact that many of you gentlemen are from a distance, and are anxious to return home, I concluded to waive the matter of form and order, and state, in a crude way, my conclusions. Nor are these conclusions reached simply from information developed in these few days. This bill was presented to me more than three months ago. I have had a copy of it in my possession since, and have taken frequent occasions to examine the stipulations of this mortgage. Further than that, the newspapers have been full of many of the features of this controversy; and the property itself, being a property starting in my own state, and growing up there, is, neither in itself nor its history, a stranger. So that many of the facts which have been presented and discussed are facts which were not new.

This bill was filed a few days after default in the payment of interest, June last. And the first question—a vital question—is whether this suit was prematurely brought; for, being a suit to foreclose, and not one for the preservation of the property, if prematurely brought, it would finally have to be dismissed, and a receiver ought not to be appointed *ad interim*. The ground upon which the claim rests is the fact that this mortgage or deed of trust requires a six-months delay after the default before certain proceedings—and foreclosure, it is claimed, is one—are permissible. The second article provides for entry by the trustee; but by its terms such entry cannot be till six months after default and demand of payment. The third article likewise authorizes sale by advertisement, and that is equally limited. At the close of that article follows this paragraph:

“This provision is cumulative to the ordinary remedies by foreclosure in the courts; and the trustee herein, or its successor or successors in this trust, upon default being made as aforesaid, may, at its discretion, and upon the written request of the

Introductory
remarks.

Whether suit
is prematurely
brought.

bondholders of a majority in value of said bonds then unpaid, shall," etc.

Now, the contention is that those words, "upon default being made as aforesaid," being in the last part of this article, by fair construction refer back to the entire provision in the first part in respect to default, and include both the happening and continuance of the default. The argument rests merely on the force of the last two words, "as aforesaid," and is forcibly put by counsel.

Same—Construction of third article of mortgage.

That is the real question in the case, for, if this last paragraph in article 3 were omitted, the decision of the supreme court in the case of *Railroad Co. v. Fosdick*, 106 U. S. 47; s. c., 12 Am. & Eng. R. R. Cas. 367, would leave no question. In that case, as appears from the statement, there were in the mortgage stipulations providing for entry and sale by advertisement six months after default. The validity of those provisions was recognized by the supreme court: but it held that, notwithstanding this, if by other stipulations in the mortgage it was a security for the payment of interest as it semi-annually accrued, as well as of the principal, the trustee, or, on his failure to act, any bondholder, might, on the non-payment of interest, bring suit and foreclose. Turning to this mortgage, I find the same provision. It is given as security for the payment of the interest as well as of the principal. By article 2 possession is secured to the railroad company,—the mortgagor,—until default be made in the payment of principal or interest. Unquestionably the right of action at law on the coupon exists. Unquestionably, if articles 3 and 4 were omitted, the mere fact that this property was by the mortgage pledged as security for the payment of coupons would permit the coupon-holder to come into a court of equity and enforce that pledge.

It is insisted that these articles, not excluding the jurisdiction of courts of law, not debarring a party from his right of action upon the coupons, deprive him of a present right of action upon the mortgage by a suit in equity to enforce that pledge. Language requiring such construction should be clear. If the parties—and it is to be assumed that they who drafted this mortgage or deed of trust were competent for that business—contemplated not merely that no entry should be made, no sale under the power until the lapse of six months after default, but also that the coupon-holder, having his right of action at law on the coupons, should not have a right of action in equity, such purpose, it seems to me, would naturally have been expressed in clear and unmistakable language, and not in that of doubtful interpretation. In every other place that I have been able to find in this mortgage, where a right rests upon the continuance of the default, and that appears in articles prior and subsequent

to this paragraph, the language is express: "In case default shall be made in payment of interest, and shall continue for six months." Now, if it was intended to limit the jurisdiction of a court of equity until after the lapse of six months from the time of the happening of the default, it seems to me that the draughtsman would have placed the stipulation therefor in a separate article, and would have made its meaning so plain that there would be no question. We all know in the preparation of instruments how common the expressions "said" or "as afore-said" are used without any clear or definite intent. They are words which we use, not thoughtlessly, but carelessly; and although they are used here, yet as it is also found that the continuance of the default is not mentioned, it seems to me it is giving to those words an enlarged and unnecessary force to hold that they broaden the expression "making default" into "making and continuing default," as expressed in the first part of the article. Nor is this a mere resting upon the language of the paragraph. It opens with the distinct announcement that these special provisions in respect to entry and sale under a power are cumulative to the ordinary remedies by foreclosure; contemplating, in its opening words, a proceeding in a court of equity in any case of default. Nor is it strange that there should be special limitations upon the two matters provided in articles 2 and 3, and none about proceedings in a court of equity. An entry is a speedy remedy; it runs to the *corpus* of the property; it takes instant hold of it, and takes it away from the mortgagor. The parties may well have contemplated that, if there was a temporary default, there should be no such speedy interference and summary seizure by the mortgagee. So a sale by advertisement—in this case an advertisement of eight weeks—is speedy and summary; and if, upon the happening of a temporary default, the trustee at the instance of a single coupon-holder should thus advertise and sell the property, it is obvious that great wrong might be done; and six months' delay is a very natural provision. But proceedings in a court of equity are not thus hasty. They are not within the control of any coupon-holder or any trustee. They stand advanced or delayed, as in the judgment of the chancellor the best interests of the property require. If it appears in any case that a coupon-holder, from improper motives, or from a simple greed for his money, is willing to wreck a large property, and comes into a court of equity upon the happening of a temporary default, it goes without saying that the chancellor holds his hands until it becomes apparent that the property as a whole cannot be saved to its owners. Inasmuch as these proceedings stand upon the discretion of a court of equity, it is not strange that the parties were willing to leave to the bond-holders and coupon-holders an

open door into such a court. They left an open door into a court at law, and there is at least equal chance, if not greater, that the freer motions of a court of equity will afford as full protection to the mortgagor. These considerations, perhaps not very clearly expressed, are the reasons which have led me to hold that this case is within the rule laid down in 106 U. S. 47, *supra*, and that this suit is not prematurely brought.

That only passes from one trouble to another. The right to foreclose does not carry with it the right to a receiver. There are many considerations that bear upon that question. Every case, of course, stands on its own merits. It is difficult to formulate any rule which, briefly stated, will control in all cases. It should appear that there is some danger to the property; that its protection, its preservation, the interests of the various holders, require possession by the court before a receiver should be appointed. It does not go as a matter of course; and yet it is not a matter that a court can refuse simply because it is an annoyance. If, looking at the situation of the litigating parties, and of the property, with the prospects of the future, it should appear to a court that they would be benefited, that their interests would be subserved by the appointment of a receiver, why, no court—although a matter resting, as it is said, in its discretion—could refuse to make the appointment.

Right to receiver on foreclosure suit.

I shall not go over all the matters that have been discussed. I want to suggest some things that have impressed me. Of course, so far as the adequacy of this security, so far as the solvency of the corporation is concerned, so far as the question whether this is a temporary embarrassment or permanent, these facts stand out confessed, indisputable at least. It has ceased to pay interest on its mortgages; one, two, three, and four have defaulted. The amount of that interest runs considerably over a million; and the payment of interest on the large mortgage comes due in two months. The business of this year from the 1st of June to the 1st of September, as shown by the statistics, is decreasing; from the 1st of September to the 14th there was a slight increase. The road is not along the main highway of travel eastward and westward. It is one running north and south, along which business to-day is, as we all in the west know, comparatively in its inception. It crosses for two or three hundred miles a territory which is occupied by Indians, and furnishes little business. It has been for years the only road that traversed that territory. Within the last year or two, two more roads have crossed, and a third is seeking to cross. Competition between these roads traversing that territory, and bringing Texas and its commerce into relations with Kansas, Missouri,

and the north, as a matter of necessity, it seems to me, must tend against the increase of earnings.

The report of the committee—a committee appointed by the company—tends to show that the payment of interest which has been made prior to this year, has been largely at the expense of the proper repairs and improvement of the road. I do not mean to say that all this is absolutely conclusive on the question, but these are matters which have forced themselves upon my mind. While it is true that—the road paying no interest since the 1st of June—the revenues have diminished by four or five hundred thousand, the amount which is due as claimed to the Missouri Pacific for advancements, yet the earnings must increase largely before these back interests can be met, to say nothing of future interests speedily maturing. That a road thus situated, some 1600 miles in length, is burdened with a mortgage of \$28,000 a mile, carries with it, to my mind, very strong evidence that there is no reasonable probability of its ever being kept in proper condition when paying the interest on such a debt. The only way in which any mortgagee can get possession of the rents and profits is through a receiver. The law of Kansas forbids any other remedy upon a mortgage than a foreclosure in the court. No possession could be had under article 2. No sale could be made under the power attempted to be given in article 3. The sole remedy is by foreclosure. Unless a receiver is appointed, the rents and profits pass into the possession of the mortgagor, to be expended by it according to its best judgment. That is affirmed by the three cases of *Railroad Co. v. Cowdrey*, 11 Wall. 463; *Gilman v. Telegraph Co.*, 91 U. S. 603; and *Dow v. Railway Co.*, 124 U. S. 652; s. c., 33 Am. & Eng. R. R. Cas. 12. Not merely that; suppose this foreclosure proceeding should pass to a decree, and the defendant appeal, its bond on appeal would be no protection to the mortgagee in respect to the rents and profits. That is settled in the case of *Kountze v. Hotel Co.*, 107 U. S. 378. So that this litigation might proceed and continue for a long time in this and in the supreme court, without ever giving the mortgagee a hold upon the profits, unless a receiver is appointed. This mortgage is a second mortgage on a large part of the road. As such mortgagee it has, more than any other party, an interest in reaching after and securing those rents and profits. The first mortgagee, having a limited amount upon the part of the road upon which its mortgage rests, may feel safe; for his principal and interest must be paid before the second mortgagee can come in. So that the complainant has a special interest in reaching for, and as soon as possible obtaining possession of, the surplus earnings. More than that, it is perfectly obvious that the real owners of this property are not in harmony. The stock con-

trols the road, but with \$45,000,000 of bonded indebtedness—\$28,000 a mile—on the road, the real owners are the bondholders, and that they are not agreed in respect to what shall be done with this property is, I think, confessed. For years the property was in the management of a certain interest. That interest was removed last spring from the control. It was not removed so long as the road was apparently prosperous, and paying its coupons. When adversity threatened it, as was natural, those who held interests in the road were not satisfied with the management, and sought control. If these gentlemen now in control could make it a promptly paying road within a reasonable time, why, it might be expected, according to the laws of human nature, that they would remain in control; but we all know how, when one fails and continues to fail, all who are interested are prone to lay the responsibility upon him, and to seek a change. And there is no certainty that another year different interests might not combine, and so the road be subject to different control. At any rate, it is very evident that there is no harmony—no unity of purpose—between those who are the real owners. Now, if it were a partnership, and it was apparent to a court that the partners had got into a quarrel, the very fact of their quarrel would be a strong reason why it should take possession of the property. Of course that consideration has not so much force in respect to a corporation, but it strengthens other considerations. Those are the principal reasons that have operated on my mind,—the default in interest, the fact that the rents and profits can only be appropriated in this way, the decreasing revenues, the recent construction of parallel roads, the fact that it passes through such a portion of territory so unprofitable, the condition of the road as developed by this report of the committee, and the conflict between various parties having real and substantial interests. Much as I should be glad to be free from the annoyance of a receivership,—and I know something about it,—it seems to me I should be delinquent if I refused this application. There are some minor matters that I might refer to, yet, perhaps, they would not strengthen anything I have said.

There is one matter, however, I must notice,—the suggestion of the Missouri Pacific that it could defeat this application, and that it was here in the attitude of a party to consent upon the condition that the balance due it was properly protected, and that no order should be made in reference to the possession by the receiver of the International & Great Northern R. or its stock. If I understood the situation to be that this application depended on the consent of the lessee, the Missouri Pacific, and its consent was tendered upon any such condition as that, there would be no receiver appointed. The rights of the lessee,

as I look upon these two instruments, are subordinate to the rights of the mortgagee, and it is the mortgagee whose application is sustained, and all parties having claims of any kind must depend upon the inherent equity of their claims. So far as the stock in the International & Great Northern is concerned, as well as some other assets, they are, as stated, now under pledge, and in the possession of this complainant; perhaps, also, attached by certain garnishment proceedings. I think the interests of the mortgagor require that there should go an order upon the complainant not to part with that possession except in obedience, of course, to the process of the courts in New York, until the ultimate rights of the parties are determined. As to the possession of the International & Great Northern, I doubt whether it is in the province of this court to determine that question. It is a separate road, whose stock, I believe, in part has become the property of the Missouri, Kansas & Texas corporation; but it is wholly situated in another circuit, and certainly at present I am not prepared to say that this court would have a right to determine whether a receiver of the Missouri, Kansas & Texas should take possession of that separate road. It may be that is a question which will have to be determined by the judge of that circuit. At any rate, I should not at present, without further consideration, perhaps consultation with Judge Pardee, feel like making any order in respect to it. It is a matter in which I shall be glad to hear counsel hereafter upon, and perhaps try and arrange with Judge Pardee jointly to hear them as soon as practical. That, I think, is about all I have to say in reference to this matter, except as to the receiver. If parties agree upon a receiver, of course I shall appoint whoever you agree upon. If not, I will hear any suggestions from any of the parties in interest, and reasons for or against any person to be named by one side or the other.

Railway Mortgages—Default—Remedies of Mortgagee.—A mortgagee, after default, may either (1) bring an action at law on the bond which the mortgage was given to secure, or (2) a suit in equity to foreclose his mortgage (See Wiltzie on Mortgage Foreclosure, p. 8, sec. 10). But the mortgagee cannot avail himself of both these remedies at the same time, and the commencement of an action of foreclosure will prevent a subsequent suit on the bond, except in extraordinary cases, where the court will grant permission for such suit to be maintained. See *Marx v. Davis*, 56 Miss. 745; *Nichols v. Smith*, 42 Barb. (N. Y.) 381; *Suydam v. Bartle*, 9 Paige Ch. (N. Y.) 294; *Williamson v. Champlin*, 8 Paige Ch. (N. Y.) 70; s. c., *Clarke Ch. (N. Y.)* 9. However, an action to foreclose may be brought after a suit on the bond has been instituted, provided such action is brought before judgment is recovered on the bond. The effect of bringing an action to foreclose after the institution of the suit on the bond will be to stay all proceedings in the former suit, unless special permission to proceed is granted by the court. See *Engel v. Underhill*, 3 Edw. Ch. (N. Y.) 249; *Suydam v. Bartle*, 9 Paige Ch. (N. Y.) 294; *Shufelt v. Shu-*

felt, 9 Paige Ch. (N. Y.) 137; s. c., 37 Am. Dec. 381; *Williamson v. Champlin*, 8 Paige Ch. (N. Y.) 70; s. c., *Clarke Ch.* (N. Y.) 9; *Pattison v. Powers*, 4 Paige Ch. (N. Y.) 549. When the mortgagee pursues both remedies concurrently, each must be governed by the rules of law applicable to the forum in which it is brought. *Tyson v. Webber*, 81 Ala. 470.

A deed of trust is in legal effect a mortgage (*Coe v. McBrown*, 22 Ind. 252; *Coe v. Johnson*, 18 Ind. 218; *White Water Valley Canal Co. v. Vallette*, 62 U. S. (21 How.) 414; bk. 16, L. ed. 154; 2 Redf. on Railways, 489); and a bondholder, who has a statutory lien upon a railroad, to avail himself of it, must induce the trustees to proceed to foreclose in the mode pointed out by the statute creating such lien. *Florida v. Anderson*, 91 U. S. (1 Otto) 667; bk. 23, L. ed. 290. Where a mortgage contains a clause providing that the trustees "upon a written request of the holders of a majority of the said bonds then outstanding shall proceed and collect," the trustee has no power to act, unless he has received such written request. *Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. (16 Otto) 47; bk. 27, L. ed. 47; s. c., 12 Am. & Eng. R. R. Cas. 367.

Same—Failure to Pay Interest.—Where the mortgage or deed of trust provides that the bonds may be considered due by any bondholder on default in payment of interest, the mortgage may be foreclosed for the whole amount, for a failure to pay a single instalment of interest. See *McLean v. Pressley's Admr.*, 56 Ala. 211; *Gates v. Boston & N. Y. A. L. R. Co.*, 53 Conn. 333; s. c., 24 Am. & Eng. R. R. Cas. 143; *Pope v. Durant*, 26 Iowa, 233; *Holden v. Gilbert*, 7 Paige Ch. (N. Y.) 208; *Bushfield v. Meyer*, 10 Ohio St. 334; *Hesie v. Gray*, 71 Pa. St. 198; *Richard v. Holmes*, 59 U. S. (18 How.) 143; bk. 15, L. ed. 304.

Such a stipulation in a railway or other mortgage is not regarded as a penalty, but simply as a provision for the earlier maturing of the deed, upon the happening of certain contingencies. See *Stillwell v. Adams*, 29 Ark. 346; *Grattan v. Wiggins*, 23 Cal. 16; *Jones v. Lawrence*, 18 Ga. 277; *Morgenstern v. Klees*, 30 Ill. 422; *Smart v. McKay*, 16 Ind. 45; *Taber v. Cincinnati L. & C. R. Co.*, 15 Ind. 459; *Hunt v. Harding*, 11 Ind. 245; *Cecil v. Dynes*, 2 Ind. 266; *Greenman v. Pattison*, 8 Blackf. (Ind.) 465; *Hough v. Doyle*, 8 Blackf. (Ind.) 300; *Andrews v. Jones*, 3 Blackf. (Ind.) 440; *Mobray v. Leckie*, 42 Md. 474; *Schooley v. Romain*, 31 Md. 575; *Salmon v. Clagett*, 3 Bland Ch. (Md.) 125; *Magruder v. Eggleston*, 41 Miss. 284; *Goodman v. Cincinnati & C. R. Co.*, 2 Disney (Ohio) 176; *Baker v. Lehman*, *Wright* (Ohio), 522; *Richards v. Holmes*, 59 U. S. (18 How.) 143; bk. 15, L. ed. 304. In the absence of such a stipulation in the mortgage, however, the decree of foreclosure can direct the payment of such part of the debt only as is due at the time of the commencement of the action, or such part as may become due before the final hearing; and enforce such decree by directing the sale of such part only of the mortgage premises, as may be necessary to pay that portion of the debt which has matured. *Mussina v. Bartlett*, 8 Port. (Ala.) 284; *Greenman v. Pattison*, 8 Blackf. (Ind.) 465; *Adam v. Essex*, 1 Bibb (Ky.), 149; s. c., 4 Am. Dec. 623; *Caufman v. Sayre*, 2 B. Mon. (Ky.) 202; *Magruder v. Eggleston*, 41 Miss. 284; *James v. Fisk*, 17 Miss. (9 Smed.) & M. 144, 153; s. c., 47 Am. Dec. 111.

Same—Right of Mortgagee to Possession.—In those states where the right of entry by the mortgagee has been abolished, the mortgagor is entitled both in law and in equity to the complete enjoyment of the mortgaged premises and of the rents and profits thereof, unless the latter have been pledged for the payment of the debt, by an express stipulation in the mortgage. *Wilsie on Mortgage Foreclosure*, p. 744, sec. 623. See *Syracuse City Bank v. Tallman*, 31 Barb. (N. Y.) 201, 208; *Zeiter v. Bowman*, 6 Barb. (N. Y.) 133, 139; *Ensign v. Colburn*, 11 Paige Ch. (N. Y.) 503;

Howell v. Ripley, 10 Paige Ch. (N. Y.) 43; *Bank of Ogdensburg v. Arnold*, 5 Paige Ch. (N. Y.) 38, 41.

Where no proceedings are instituted for the appointment of a receiver to take charge of the rents and profits and to apply them in discharge of the mortgage obligation, the right of the mortgagor to receive the rents and profits will continue until divested by a foreclosure and sale, and the purchaser is entitled to possession under the referee's deed. *Wiltie on Mortgage Foreclosure*, p. 745, sec. 623. See *Argall v. Pitts*, 78 N. Y. 239; *Mitchell v. Bartlett*, 51 N. Y. 447; *Cheney v. Woodruff*, 45 N. Y. 98, 101; *Whalin v. White*, 25 N. Y. 462, 465; *Giles v. Comstock*, 4 N. Y. 270, 275; s. c., 53 Am. Dec. 347; *Miner v. Beekman*, 11 Abb. (N. Y.) Pr. N. S. 147, 152; s. c., 42 How. (N. Y.) Pr. 33, 37; 33 N. Y. Supr. Ct. (1 J. & S.) 67, 77; *Peck v. Knickerbocker Ice Co.*, 18 Hun (N. Y.), 183, 186; *Astor v. Turner*, 11 Paige Ch. (N. Y.) 436; s. c., 43 Am. Dec. 766; *Howell v. Ripley*, 10 Paige Ch. (N. Y.) 43; *Clason v. Corley*, 5 Sandf. (N. Y.) 447; *Lofsky v. Maujer*, 3 Sandf. Ch. (N. Y.) 69.

Unless otherwise provided by statute, a mortgagee may take possession of the mortgaged premises to obtain payment of his debt. Where such possession is taken the payment thus obtained is subject, as respects its appropriation, to the legal rules which govern the appropriation of other payments. See *Leeds v. Gifford*, 41 N. J. Eq. (14 Stew.) 464. And where the mortgagor, after the maturity of the mortgage debt, or on default in payment of an instalment thereof, gives the mortgagee permission to enter, such mortgagee may rightfully do so at any time and hold possession until the debt is paid. *Fee v. Swingly*, 6 Mont. Tr. 596.

Same—Appointment of a Receiver.—It is said that in an action for the foreclosure of a mortgage, the plaintiff is entitled to the appointment of a receiver to take charge of the property and to collect the rents and profits thereof, when it is made to appear, either that the premises will probably be insufficient to pay the mortgage debt (*Main v. Ginthert*, 92 Ind. 180; *Barnett v. Nelson*, 54 Iowa, 41; *Myton v. Davenport*, 51 Iowa, 583; *Jacobs v. Gibson*, 9 Neb. 380; *Hollenbeck v. Donell*, 94 N. Y. 342; *MacKellar v. Rogers*, 52 N. Y. Supr. Ct. (20 J. & S. 360), or that the party who is liable for any deficiency in the security is insolvent. *Wiltie on Mortgage Foreclosure*, ch. 31. See *Price v. Dowdy*, 34 Ark. 285; *Main v. Ginthert*, 92 Ind. 180; *White v. Griggs*, 54 Iowa, 650; *Myton v. Davenport*, 51 Iowa, 583; *Douglass v. Cline*, 12 Bush (Ky.), 608; *Chase's Case*, 1 Bland Ch. (Md.) 206; *Brown v. Chase*, Walk. Ch. (Mich.) 43; *Phillips v. Eiland*, 52 Miss. 721; *Mitchell v. Bartlett*, 51 N. Y. 447; *Astor v. Turner*, 3 Barb. (N. Y.) 444; *Hollenbeck v. Donell*, 29 Hun (N. Y.), 94; reversed in 94 N. Y. 342; See *Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565, 568; *Kerchner v. Fairley*, 80 N. C. 24; *Henshaw v. Wells*, 9 Humph. (Tenn.) 568; *Schrieber v. Carey*, 48 Wis. 20.

Same—Discretion of Court.—The appoint of a receiver in an action to foreclose a mortgage is a matter which rests in the sound discretion of the court before which the action is pending. *Douglass v. Kline*, 12 Bush (Ky.), 644; *Jacobs v. Gibson*, 9 Neb. 380; *Nicholas v. Perry P. Co.*, 11 N. J. Eq. (3 Stockt.) 126. See *Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565; *Wiltie on Mortgage Foreclosure*, p. 781, sec. 657. It may be said, however, that a receiver will always be appointed where it is made satisfactorily to appear to the court, that such appointment is essential to protect the interest of the parties and secure the payment of the mortgage debt. See *Myers v. Estell*, 48 Miss. 403; *Ogdensburg Bank v. Arnold*, 5 Paige Ch. (N. Y.) 39; *Clason v. Corley*, 5 Sandf. (N. Y.) 477; *Schreiber v. Carey*, 48 Wis. 213; a receiver will also be appointed in those cases where circumstances of fraud or bad faith on the part of the mortgagor are shown (*Haas v. Chicago Building Association*, 89 Ill. 498), and those cases where

there are other facts involved in the action which would render the denial of a receiver inequitable and unjust. *Haas v. Chicago Bld. Assoc.*, 89 Ill. 498; *Bloodgood v. Clark*, 4 Paige Ch. (N. Y.) 577; *Vann v. Barnet*, 2 Bro. Ch. 157; *Metcalf v. Pulvertoft*, 1 Ves. & B. 180.

For a full discussion of the question of the right to have a receiver appointed, and the method of his appointment, see *Wiltie on Mortgage Foreclosure*, pp. 744 to 820.

COMMONWEALTH

v.

SUSQUEHANNA AND D. R. CO.

(*Pennsylvania Supreme Court, October 1, 1888.*)

Railway Mortgages—Foreclosure—Sale of Franchise—Interest of Purchaser.—A purchaser at an execution sale of the property and franchises of a railroad company under a judgment recovered by a holder of a part of a series of trust mortgage bonds for interest upon the bonds held by him, takes only the equity of the company and is not entitled to the property, rights, etc., of the company freed from the lien of the mortgage.

ERROR to Court of Common Pleas, Dauphin County.

The opinion states the facts.

H. Trumbore for the commonwealth.

F. Jordan for defendant in error.

WILLIAMS, J.—This case involves the title of the defendant company to franchises, right of way, and other property of the Pennsylvania & New England R. Co. The facts on which the controversy arises are as follows: On the 5th May, 1880, the Pennsylvania & New England R. Co. was organized under the general railroad laws of the commonwealth. What became of its capital stock if it was honestly organized, or in what manner the laws were evaded if it was not, are subjects upon which the paper books afford no light; but on the 1st June, about as soon as the blanks could be prepared, the company issued coupon bonds, payable in 1900, to the amount of \$1,100,000. The interest was payable semi-annually on the 1st days of June and December. To secure the payment of these bonds, with their interest, the company executed a mortgage, to trustees, covering their corporate franchises, right of way, and other property, with the usual covenants and stipulations, among which was the following provision: "If default be made in the payment of any of the said coupons or instalments of interest as aforesaid, for a period of one year, it shall

Facts.

be the duty of the trustees, or the survivors of them, or their successors, upon the written request of the holders of lands upon which interest shall remain unpaid, representing bonds to the amount of three hundred thousand dollars (\$300,000) there outstanding, to sell and dispose of said mortgaged premises; . . . the equity of redemption being hereby waived and released on the part of said company, and full authority to sell as aforesaid being vested in said trustees, and apply the proceeds of said sale to the payment and satisfaction of the principal and interest in said bonds." On the 1st June, 1881, just one year from this date, the company made default in the payment of the interest on their bonds, and have remained in default ever since. Such is the suggestive story of this corporation, save only that it does appear that enough of the funds of the company were devoted to corporate purposes to build one mile and one sixth of a mile out of the 107 miles of the main line projected by it. The defendant company claims title to the franchises and property of the Pennsylvania & New England R. Co., by means of a sheriff's sale founded upon a judgment for unpaid interest on 18 of the coupon bonds. It appears that on the 3d June, 1881, after the default in payment of the interest, Frederick Baker became the owner of 18 bonds, for \$1000 each, and on the next day brought suit upon the unpaid coupons in the common pleas of Philadelphia. After service of the summons upon the company, he obtained judgment by default, on the 25th of the same month, for \$524.25 and costs. A writ of *fi. fa.* was issued on the 27th, and returned demand made, etc., by the sheriff on same day. A few days later an exemplified copy of the judgment and subsequent proceedings was filed in Lehigh county, and *fi. fa.* issued thereon, by virtue of which the sheriff levied, and on the 18th July sold D. Kilgus the franchises, right of way, and property bound by the mortgage for \$600. About four weeks later the defendant company was organized, and became the holders of the title which Kilgus acquired by the sheriff's sale, and now claims to be legally invested with the franchises originally granted to the Pennsylvania & New England R. Co. The position of the defendant is that the judgment on which the sale to Kilgus was made was obtained for interest upon bonds which were part of the mortgage debt, and that a sale upon such a judgment divested the lien of the mortgage, and vested an unincumbered title, to all the property sold, in the sheriff's vendee, under the act 7th April, 1870. The learned judge of the court below adopted this view of the case, and applied the rule in *Pierce v. Potter*, 7 Watts, 475, to the sale by the sheriff of Lehigh county under which the defendant claims. This ruling is the error assigned.

In *Pierce v. Potter* a bond and mortgage had been taken in

the usual form by a creditor. When a default in payment occurred, the creditor, instead of proceeding by *sci. fa.* on his mortgage, caused judgment to be entered on the bond, and proceeded to levy and sell the land bound by the mortgage by process issued upon the judgment so entered. It was struck down to the plaintiff, the mortgagee, for less than the amount due on mortgage. The mortgagor notified the plaintiff to enter satisfaction on the mortgage, which he declined to do, and suit was brought by the mortgagor for such refusal. It was held in that case that while the sale of the land for less than was due might not extinguish the debt, it did extinguish the lien of the mortgage, and the purchaser took all the title the defendant had in the land, free from all incumbrances suffered by him. This rule has been followed in later cases, and is well settled. If this case comes fairly under its operation, the judgment of the court below must be affirmed, but there is room to distinguish broadly between a mortgage of land in the common form and a mortgage of the franchises and right of way of a railroad company like the one now before us. In the former, the bond and mortgage are payable to the creditor; both are under seal; both pass only by assignment; both are taken as constituting together one security; and the creditor may, on default made by his debtors, resort to either an action on the bond or a *sci. fa.* on the mortgage. In either case, the debtor has actual notice of the proceedings in all its stages, and in either case the land covered by the mortgage must be sold as land. But in the latter form of mortgage the conveyance is not to the creditor, actual or prospective, but to a trustee who takes title to the franchises, etc., for those who may become holders of the bonds secured thereby. Until default is made in the payment of the bonds or the interest falling due upon them, the trustee has no active duties to perform, but is simply the repository of the title to the property mortgaged, in trust for the whole creditor class secured thereby. The actual possession of the franchises and the property remains in the railroad company, to enable it to discharge its duties to the public, and earn an income from which to pay its liabilities. But when a default occurs the duties of the trustee become active and important; he represents all the bondholders, and is under obligation to protect them, so far as the property in his hands in trust for them will enable him to do so. If he neglects or refuses to move any bondholders may proceed by bill filed on behalf of himself and the other members of the class of creditors to which he belongs to compel a sale of the mortgaged premises, a removal of the trustee, or such other relief as may be appropriate. The bonds are not payable to the mortgagee, but to

Case of Pierce
v. Potter.

Distinction
between mort-
gage of land
and of rail-
road company.

the bearer. They are not specialties, but negotiable instruments, passing from hand to hand by delivery or indorsement. They find a market in all parts of the civilized world, and are held as an investment in moneyed institutions and by private persons. The mortgagee has no right to the custody of one of the bonds unless he buys it like any other investor, and they furnish him no choice of remedies. He is shut up to the remedies provided by the mortgage, and those which the courts of equity may afford him for the purpose of bringing the mortgaged property to sale.

There is also an equally broad distinction between the nature of the property mortgaged by a private person and that mortgaged by a corporation. In the first case, the mortgage is of land, as such, which is subject to lien in the county in which it lies, and must be sold there, and whether *lev. fa.* on the mortgage, or a *vend. ex.* upon a judgment entered on the bond, is wholly immaterial to the debtor and to everybody. The same

Same—Distinction between nature of property mortgaged.

notice personally or by publication must be given in either case, and the result as to the mortgaged premises is an extinguishment of the lien of the mortgage, no matter which method is adopted. But the corporation, under the authority of an act of assembly, mortgages its franchises, the gift of the state, its corporate powers, and corporate property. These are not land, and the mortgage is a lien upon them only because the making of such a mortgage is expressly authorized by law. By the terms of the mortgage this personal property is conveyed to the mortgagee in trust for sale and conversion into money in a particular manner, and he is charged to apply the proceeds to the payment of bondholders *pro rata*. He takes the title in trust, and his title cannot be divested except by his own act, or the decree of a court of competent jurisdiction. The bonded debt is a unit so far as his duties and powers are concerned. He must regard the bondholders as a class, and not as individuals. He cannot permit, and, if so wanting in fidelity to his trust as to be willing, the courts will not permit, the least discrimination between members of the same creditor class. This

Statutory provisions.

is the fair effect of statutory provisions relating to this subject. Section 8 of the act of April 4, 1868, provides that "the president and directors of any railroad company . . . shall have power to borrow money, not exceeding the amount of the capital stock subscribed, and issue the bonds of the company therefor, . . . to be payable at such time, not exceeding 50 years after the date thereof, and at such place, and rate of interest not exceeding 7 per cent, as said directors may deem best, and secure the payment of said bonds and interest by a mortgage on said road and franchises." So

the act of 13th March, 1871, declares that it shall be lawful for any railroad company "to secure the payment of any and all bonds" issued by it by a mortgage upon the whole or any part of the "property rights and franchises" of said company. The mortgage to the trustee is the basis of the loan, and the bonds in the hands of the holder are the evidence of the extent of his interest or share in it. It has been held to be a presumption of law that all the bonds were issued at the same time which were secured by the same mortgage, and that the fact that they were numbered consecutively gave no priority to any, and interfered in no manner with the equality of their holders on distribution. That distribution must be made *pro rata* is well settled. *Perry's Appeal*, 22 Pa. St. 43; *Sheaff's Appeal*, 55 Pa. St. 403; *Pennock v. Coe*, 23 How. 117. That the remedy of the bondholders against the property conveyed to the trustee is through him only is fairly to be inferred from the cases. In New Jersey a bill for foreclosure of the mortgage may be brought by the trustee, or by the bondholders against the trustee (*Water Co. v. De Kay*, 36 N. J. Eq. 548); and *Dow v. Railroad Co.*, 20 Fed. Rep. 260, holds the same rule, and it is in harmony with the general doctrine relating to the rights and duties of trustee and *cestui qui trust*. As to other property of the company not conveyed to the trustee, the bondholder may treat himself as an individual creditor, and may proceed to recover judgment for the amount of unpaid coupons or bonds, and to enforce the collection thereof against the defendant. *Carr v. Le Fevre*, 27 Pa. St. 413; *Railroad Co. v. Johnson*, 54 Pa. St. 127. But his execution must be levied on property actually owned by the company, and not upon that which has been conveyed to trustees by mortgage or deed of trust duly executed and recorded. He stands, when suing at law and proceeding against the railroad company, on the same plane as any other creditor. His writ of *fi. fa.* will reach the same property, and in the same way. When, however, it becomes necessary for him to reach the property held by the trustee, he must proceed against him, not for his own separate benefit, but as a bondholder, and on behalf of the bondholders as a class. What may be realized by such proceedings belong to the whole class, and must be distributed among its members *pro rata*. This is recognized, though not distinctly asserted, in *Bradley v. Railroad Co.*, 36 Pa. St. 141, and in *Mendenhall v. Railroad Co.*, reported as a note to the case last cited. The case of *Railroad Co. v. Woelpper*, 64 Pa. St. 366, is, however, an authority substantially in point. *Woelpper* held bonds amounting to \$7200, secured by a mortgage upon the franchises,

No priority
between bond-
holders—
Their remedy.

Remedy
against un-
mortgaged
property.

Proceeding
against
trustee—Rail-
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liberties, property, etc., "now held, or hereafter to be acquired," by the Philadelphia & Baltimore Central R. Co. The Philadelphia, Wilmington & Baltimore R. Co. held bonds secured by the same mortgage for \$122,942.11; and, a default having been made, recovered judgment for the said sum, and levied upon the engines and rolling stock of the company. Woelpper filed his bill against the plaintiff in the writ and the sheriff, asking, among other forms of relief, "that it be declared that the property levied upon as aforesaid is a part of the mortgaged premises, and is exempt from levy and sale under the execution on the judgment hereinbefore mentioned, or under any other execution that may hereafter be issued thereon." The master recommended a decree in accordance with the foregoing prayer. The court of common pleas of Chester county made the decree as recommended. The case was brought into this court by appeal, and the decree was affirmed, and appeal dismissed. We have been referred to the case of *Railroad Co. v. Fosdict*, 106 U. S. 47; s. c., 12 Am. & Eng. R. R. Cas. 367, as holding a contrary doctrine; but an examination of that case does not sustain the position of the defendant in error. The sale of the mortgaged property was made by the trustee, and the questions were of distribution. We cannot see that the points mentioned in that case are adverse to, but regard them rather as in harmony with, the conclusions we have reached in this.

Our attention has been called also to the act of April 7, 1870, as sustaining the position of the defendant in error, and as vesting in the sheriff's vendee a title to the mortgaged property clear from the incumbrance of the mortgage. We do not so understand the provisions of that act. It gives a new remedy to creditors who, prior to its passage, could reach the franchises of a corporation only by process of sequestration, under the act of 1836. In lieu of seizure and sequestration, it authorizes seizure and sale of the rights and franchises of the debtor corporation, and declares that the purchaser shall take the same "clear from all incumbrances, except any mortgage or mortgages that may legally exist at the time of levy thereupon, the lien of which shall not be affected in any manner by said sale." If the title to the property and franchises is in the corporation when seizure is made, the sale passes the defendant's title free from incumbrances, and the holders of liens must look to the fund. But if the title has been pledged or conveyed to trustees before the seizure, the defendant has only an equity of redemption in the property mortgaged or conveyed; and, upon process against the corporation, no greater interest can be seized and sold than the defendant has in the thing seized. The process is not against the trustee. The trustee's title is therefore unaffected. In re-

Act of April 7,
1870.

cognition of this principle, the provision expressly saves the "mortgage or mortgages that may legally exist at the time of levy." We therefore conclude as follows: (1) The sheriff's sale to Kilgus passed only such title as the corporation had at the time of the levy in the items of property seized upon the *fi. fa.* (2) The title held by the trustee, for the purposes expressed in the mortgage, to the rights, franchises, and other property covered by the mortgage, is not affected in any manner by said sale. (3) The sheriff's vendee, Kilgus, and the defendants in this case have no title whatever to the corporate rights and franchises held by the Pennsylvania & New England R. Co., and by that company conveyed to the trustee named in the mortgage, by virtue of the sheriff's sale set up in their answer. (4) Judgment should have been entered in favor of the commonwealth on the demurrer.

Conclusions of court.

Railway Mortgages—Foreclosure—Sale of Franchise.—While it is true that a railway company's interest in the land held by it may be sold under an execution against it (*State v. Rives*, 5 Ired. (N. C.) L. 297; *Philadelphia & B. R. Co.'s Appeal*, 70 Pa. St. 355), and also its right of way or license conferred by municipal ordinances (*New Orleans, S. F. & L. R. Co. v. De Lamore*, 34 La. An. 1225), yet in the absence of statutory enactment, its corporate franchise or right to exist cannot be levied upon and sold (*State v. Rives*, 5 Ired. (N. C.) L. 297. See *Meyer v. Johnson*, 53 Ala. 207, 325. Compare *Peirce v. Emery*, 32 N. H. 484.), because it is a well established common law rule that the corporate property essential to the enjoyment of the franchise is not subject to sale on execution, unless the legislature assents to the transfer. *Wood v. Truckee Turnpike Co.*, 24 Cal. 474; *Thomas v. Armstrong*, 7 Cal. 286; *Munroe v. Thomas*, 5 Cal. 470; *Hatcher v. Toledo, W. & W. R. Co.*, 62 Ill. 477; *Tippetts v. Walker*, 4 Mass. 595, 597; *Ludlow v. Hurd*, 1 Disn. (Ohio) 552; *Oakland R. Co. v. Keenan*, 56 Pa. St. 198; *Ammant v. New Alexandria & P. T. Co.*, 13 Serg. & R. (Pa.) 210; *Leedom v. Plymouth R. Co.*, 5 Watts & S. (Pa.) 265. Compare *State v. Rives*, 5 Ired. (N. C.) L. 297.

AMERICAN LOAN AND TRUST CO.

v

EAST AND WEST R. CO.

(U. S. Circuit Court, N. D. Alabama, S. D., January, 11, 1889.)

Railway Mortgages—Foreclosure—Consolidation of Actions—Pleading *Lis Pendens*.—Where a contractor for the building of certain portions of a railway having filed a bill against the company, alleging, among other things, the execution by said company of several deeds of trust to the same trust company, and praying that an account be taken by the court of the valid indebtedness of said company; that a judgment recovered by said contractor for the amount of his claim be decreed a first lien upon a certain portion of the road; and that said deed of trust, without specifying which one, may be foreclosed for the satisfaction and payment of the debts secured thereby, except such bonds as were illegally issued, to which bill the trustee under the deeds of trust demurred and afterwards filed a bill to foreclose the trust deeds, and the suits were consolidated upon the court's own motion, the trustee being called complainant and the contractor intervenor, a plea of *lis pendens* subsequently filed by the contractor to the complainant's bill, is insufficient, although he prayed for the foreclosure in his bill, since no such foreclosure could be had in his suit unless the trust company had seen fit to ask it by way of cross-bill.

Same—Foreign Corporation—Contracts—Plea in Bar.—Since under article 14, section 4, Ala. Const., providing that no "foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent," the contracts in Alabama and relative to Alabama property made by a foreign trust company doing business in Alabama without having a known place of business, or authorized agent, are not void, but merely voidable: a plea in bar to a foreclosure suit by such company based on that provision of the constitution, is not sufficient.

IN EQUITY. On demurrer and pleas. The opinion states the facts.

Crane, Ludlow & Fowler for complainant.

Webb & Tillman for intervenor.

PARDEE, J.—On the 13th of March, 1888, James W. Schley, a citizen of Georgia, brought his bill against the East & West R. Co. of Alabama, and the American Loan & Trust Co. *et al.*, and therein complained that he had been a contractor for the building of certain portions of the line of the East & West R. Co. of Alabama, and that for the amount due him on the construction of a certain portion of the line he had recovered a judgment against said railroad company in the circuit court of Cherokee county, Ala., for the sum of \$13,760

Facts.

and costs of suit; that said judgment was wholly due and unpaid; that said railroad company was insolvent; and that complainant was unable, by process of execution, to collect his judgment. He further averred that in and about the construction of its line, and the maintenance thereof, the said East & West R. Co. of Alabama had contracted and issued a bonded indebtedness for about \$1,100,000, known as the "First Mortgage Bonds" of said railroad company, which said bonds were secured by a first mortgage or deed of trust on its said road-bed, right of way, franchises, and all other property which belonged to said company, conveying the same to said American Loan & Trust Co., as a trustee for the holders of said bonds, and that the said bonds, so secured, were issued and negotiated in the state of New York; and that afterwards, for purposes and uses not known to the complainant, the said East & West R. Co. of Alabama had issued and negotiated about \$500,000 of what is known as "Debenture Bonds," secured by a second mortgage or deed of trust to the same trustee, some of which were negotiated; and that the entire bonds of the said railroad company, including both the aforesaid issues, on the 19th day of February, 1887, amounted to \$1,600,000; that on or about the 19th day of February, 1887, the said railroad company issued its consolidated bonds at the rate of \$15,000 a mile, and executed a deed of trust upon all its property to the said American Loan & Trust Co., which said bonds were to be deposited with the said trust company, to be certified and delivered to said railroad company only at the rate of \$15,000 per mile of road, as the same shall be completed and ready for operation. It is further averred in said bill that, after the issue of the said consolidated bonds as aforesaid, the East & West R. Co. gave in exchange consolidated bonds for the aforesaid debenture bonds, and that the said debenture bonds, for reasons in said bill stated were without consideration, illegal and void, and constituted no part of the valid indebtedness of said railroad company, and that the consolidated bonds given in exchange were also illegal and void. The relief sought by the bill was that an account be taken by the court of the valid indebtedness of said railroad company on its said bonds and mortgages, and upon complainant's judgment; that complainant might be decreed to have a first lien upon a certain portion of the railroad line; that said deed of trust, without specifying which one, might be foreclosed for the satisfaction and payment of the debts secured thereby, except such bonds as were illegally issued; for a receiver pending the litigation; and for general relief. To this bill the American Loan & Trust Co., specially appearing for the purpose, filed a demurrer to the jurisdiction of the court. Afterwards, on the 7th day of July, complainant filed an amendment

to his bill. This amendment set forth that one Amos G. West, who had been made a party to the original bill as a holder of some of the bonds charged to be illegal, was not a necessary party to the suit; and that, inasmuch as he resided in the state of Georgia, in which state the complainant resided, his presence challenged the jurisdiction, and prayed for dismissal as to West. Upon this the American Loan & Trust Co. renewed its demurrer. Afterwards the American Loan & Trust Co. brought its bill in this court against the East & West R. Co. of Alabama for the foreclosure of the first consolidated trust deed and mortgage, granted by the East & West R. Co. of Alabama, and to this bill James W. Schley, Joel Brown, and S. I. Stevens were joined as parties defendant, on the ground that they claimed an interest in, or liens upon, the railroad company's property. Complainant alleged default in the payment of interest, the necessary request of bondholders to bring suit for foreclosure, the insolvency of the company, and also prayed for a receiver. Upon notice, the application for a receiver came on to be heard before the circuit judge. After hearing, all the proper parties being before the court, the court of its own motion directed and ordered "that the suit of James W. Schley against the said East & West R. Co. of Alabama *et al.*, pending in this court, be, and the same is hereby, consolidated with the suit of the American Loan & Trust Co., complainant, against the East & West R. Co. of Alabama *et al.*, without prejudice, however, to the rights of the defendants in suit of Schley against the railroad company to raise any jurisdictional questions now present in the record of such suit; that in such consolidated cause the American Loan & Trust Co. shall be the complainant, and the said East & West R. Co. of Alabama, defendant; and the said Schley shall stand therein as an intervenor, and his pleadings heretofore shall be taken as pleadings sufficient for such purpose in said consolidated case." Thereupon, on leave of the court, defendant Schley filed two pleas,—one of *lis pendens*; the other in bar of the suit. By consent of counsel the said two pleas of Schley and the demurrer of the American Loan & Trust Co. to Schley's bill have been submitted to the circuit judge on briefs, and are now for decision.

1. The demurrer of the American Loan & Trust Co. to Schley's bill being on the ground that the court was without jurisdiction of the American Loan & Trust Co. at the time of the commencement of the suit, however good when filed, seems now to fall by the order of consolidation, and the fact that the American Loan & Trust Co. has voluntarily appeared; in fact, counsel for the trust company take this view of the matter, and ask leave to withdraw the demurrer.

Jurisdiction
over American
L. and T. Co.

2. The same result seems to follow with regard to the plea of *lis pendens* filed by Schley to the foreclosure bill. It is doubtful, however, whether this plea would be sufficient if the order of consolidation had not been made. It is true that Schley, in his bill for an account and marshalling of liens, prays for a foreclosure of some deed of trust after an account shall be taken as to the valid outstanding bonds; but it is difficult to see what right he would have to a foreclosure of a mortgage in which he had no title. Besides this, although the foreclosure was prayed for by Schley, no such foreclosure could be had in his suit, unless the trust company had seen fit to ask it by way of cross-bill. When a cross-bill is necessary to the defence of a party, he must file it to establish his defence. When a cross-bill is necessary to bring the parties before the court in order that equity may be done, the court may order one filed; but where a party is merely entitled to a cross-bill in order to obtain affirmative relief, he may or may not file it, at his discretion, and without prejudice to his rights.

Plea of *lis pendens*.

3. The plea in bar filed by Schley is based on section 4, art. 14, of the constitution of Alabama, as follows:

Foreign corporation —
Contracts.

"No foreign corporation shall do any business in this state without having at least one known place of business, and an authorized agent or agents therein; and such corporation may be sued in any court, where it does business, by service of process upon an agent anywhere in this state."

This plea does not aver specifically that the American Loan & Trust Co. is doing business in the state of Alabama, but avers that it is a foreign corporation, has accepted the trust from the East & West R. Co. of Alabama, and has no known place of business nor authorized agent within the state; the inference seeming to be that the said company is doing business in this state, because it has accepted the trust under the trust deeds issued by the East & West R. Co. It is to be doubted very much whether the transaction of its legitimate business in the city and state of New York, on the part of the American Loan & Trust Co., is doing business in Alabama, in the sense of the constitutional article, when it accepts a trust thereafter on a contingency to be executed in Alabama. The provisions of the trust deed, which is made the basis of the foreclosure suit, do not indicate that any business is to be transacted in Alabama by the trustee, unless default shall be made in the payment of interest, as provided by the trust deed. In case of default, the trust deed provides several lines of procedure upon the part of the trustee in the execution of his trust. One is that the said trustee may enter into possession of the said railway line and property, and manage and operate the same for the account of the bondholders.

ers, and apply the proceeds of such management to the payment of interest on the mortgage debt. Perhaps, if this provision of the trust deed should be acted upon, and the trust company should take possession of the railway line and operate the railway, the trust company would then be doing business in Alabama, and would then be compelled, in compliance with the constitutional article, to provide at least one known place of business and one authorized agent. Another provision of the deed of trust is that, on default in the payment of interest, and on the petition of bondholders, the trustee shall bring a suit to foreclose the trust deed. Such suit is the one brought by the trust company in this cause. Merely bringing a suit in the circuit court of the United States in the state of Alabama for foreclosure of a mortgage cannot be said to be doing business in the state of Alabama in any such sense as to require an agent, other than a solicitor, or any known place of business. However this may be, the question submitted by this plea is decided adversely to the pleader by the jurisprudence of Alabama, as declared in the supreme court of the state. In the case of *Sherwood v. Alvis*, 83 Ala. 115, it is held upon principle and authority that, although a foreign corporation does business in Alabama without having at least one known place of business or authorized agent or agents therein, that its contracts made in the state of Alabama, and relating to Alabama property, are not void, even if voidable, by reason of the constitutional provision aforesaid. If the deed of trust granted by the East & West R. Co. of Alabama in favor of the American Loan & Trust Co. is not void, there can be no good reason why the said trust company may not bring suit to foreclose the deed of trust. An order will be entered in this case permitting the American Loan & Trust Co. to withdraw its demurrer to Schley's bill on payment of costs; if not so withdrawn, then to be overruled with costs; and declaring the said plea in abatement and plea in bar filed by Schley to the bill of the American Loan & Trust Co. to be insufficient, and that they be overruled, with costs.

FOSTER

v.

MANSFIELD, C. AND L. M. R. Co. *et al.**(U. S. Circuit Court, N. D. Ohio E. D., August 24, 1888.)***Railways—Bonds and Mortgages—Collateral Agreement—Construction.—**

Where a railway company employs a construction company to build certain portions of its track, agreeing to issue bonds in payment therefor, to a certain amount per mile of track, in instalments, as sections of the railroad shall be completed, and by a subsequent agreement such bonds are delivered in advance of the construction of the track, the construction company agreeing to take care of and pay all interest accruing previous to the railway becoming in a condition for traffic, and the railway company agreeing to reimburse the construction company for all interest paid on the principal chargeable to it out of the first earnings of the road, the construction company is bound to pay interest only on so many of the bonds as it received and used, to which it was not entitled under the construction contract.

Same—Foreclosure—Defence.—Where a bill against such railway company for the foreclosure of a mortgage to secure such bonds and coupons is brought by the trustees in the mortgage at the instance of the corporation to whom the bonds were negotiated, the agreement of the construction company to pay the interest is not a valid defence.

Same—Sale—Bill to Set Aside by Stockholder—Laches.—Where ten years after a purchase of the property at foreclosure sale by another railway company, which held the bonds, a bill is filed by a stockholder of the mortgagor company to set aside the sale as fraudulent, predicated the fraud on an alleged defence to the foreclosure bill which the directors, of whom a majority were alleged to be connected with the creditor company, ordered withdrawn, a decree by confession being thereupon entered, the facts alleged in the bill appearing on the face of the foreclosure proceedings to have been accessible, if not known to the complainant and known to the officers of the corporation, and the bill not charging any concealment of any of the transactions, nor showing any reason for the delay, equity will refuse relief on the ground of laches.

Same—Bill by Stockholder to Set Aside Sale—When Permissible.—A bill on behalf of the corporation to have such a sale set aside as fraudulent may be filed by a stockholder after refusal of the stockholders to do so.

IN EQUITY. On demurrer sustained to a bill by Charles Foster against the Mansfield, Coldwater & Lake Michigan R. Co. and others to set aside a foreclosure decree and sale of the property of said company as fraudulent.

Doyle & Scott for complainant.

J. Twining Brooks and *R. P. Ranney* for demurrants.

JACKSON, J.—The object and purpose of the present bill is to open the decree of this court, rendered in 1877, in the foreclos

ure proceeding in the case of "Thomas A. Scott and George W. Cass *v.* The Mansfield, Coldwater & Lake Michigan

**Object of suit
- Citizenship
of parties.**

R. Co.," under which said company's line of road, with its franchises and property, was sold. The decree in said cause is sought to be set aside and vacated on the ground that it was obtained by fraud, and worked an injury and wrong to said railroad company, which the corporate management, after request on the part of the complainant as a stockholder therein, have refused or neglected to take steps to remedy or redress. There is no want of jurisdiction growing out of the fact that some of the defendants to the present suit are citizens of the same state (Ohio) with the complainant, inasmuch as this suit may properly be regarded as ancillary or supplementary to the original suit in which the decree complained of was made. It is well settled that in such cases suit may be maintained without regard to the citizenship of the parties. See *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609-633; *Krippendorf v. Hyde*, 110 U. S. 276, and *Railroad Co. v. Railroad Co.*, 111 U. S. 505. It is also well settled that a shareholder may interpose

Suit by shareholder.

and set the machinery of the law in motion for the protection of corporate rights, or the redress of corporate wrongs, when the corporate management, after proper demand, refuse or fail to act in the matter. Generally, when it is necessary to sue in order to enforce corporate rights or avert wrongs threatening the corporate interests, the suit must be brought by the corporate management in the name of the corporation. This rule applies to suits both at law and in equity. Individual shareholders are not, ordinarily, the proper parties to sue or defend on behalf of corporate interests. If, however, the corporate management fails or refuses to protect or enforce corporate rights after proper request so to do, or commits breaches of trust, or is guilty of fraudulent acts and conduct, whereby irreparable injury is done or threatened to corporate interests, a shareholder, in a case where the corporation itself would be entitled to sue and obtain relief, may bring suit on behalf of himself and others in like situation, for the protection or assertion of corporate rights and interests. The conditions and circumstances under which the individual stockholders is allowed to sustain, in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself would be the proper complainant, are fully set forth in *Hawes v. Oakland*, 104 U. S. 450-460, and in the requirements of equity rule 94. It is important to bear in mind that the rights involved in such suits are not those of the shareholder who sues, but of the corporation, whose rights are sought to be asserted. The cause of action which the individual stockholder is allowed to enforce in

such cases is one belonging, not to the stockholders, but to the corporation itself. Thus in *Davenport v. Dows*, 18 Wall. 626, it is said :

" But such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert on behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. . . . The relief is asked on behalf of the corporation, not the individual shareholder; and, if it be granted, the complainant derives only an incidental benefit from it."

The present suit falls within this rule, and the case presented by the demurrer to the bill then divides itself into two leading questions: First, has the

Questions presented.

Mansfield, Coldwater & Lake Michigan R. Co., under the showing made by the bill, any right to complain of the decree rendered by this court in 1877, in the foreclosure suit of Thomas A. Scott and George W. Cass against said corporation; and, secondly, if the company was ever entitled to have said decree set aside and vacated for fraud in its procurement, has that right been lost by the "laches" of itself or of complainant in the assertion of said rights?

The record in the case of "Thomas A. Scott and George W. Cass *v.* The Mansfield, Coldwater & Lake Michigan R. Co. *et al.*" is filed with and made a part of complainant's bill. It appears from the bill and said record that said Scott & Cass, as the trustees under the original and supplemental mortgages executed by said Mansfield, Coldwater & Lake Michigan R. Co. on the 1st October, 1871, and 1st October, 1872, respectively, to secure the payment of certain coupon bonds issued by said company, filed their bill in this court on January 20, 1876, against said railroad company and Swan Rose & Co., general creditors thereof, to have said mortgages foreclosed by a sale of the road and other property covered by or embraced in the mortgages, because of the default of the mortgagor in the payment of the interest on \$1,600,000 of said bonds then outstanding in the hands of *bona fide* and lawful holders thereof. The interest accrued thereon and alleged to be in default was stated to be \$270,000, \$35,000 of which was due October 1, 1873; \$35,000 was due and payable April 1, 1874; \$56,000 became due April 1, 1875, and \$56,000 matured October 1, 1875, which several instalments, with interest since date of maturity till time of filing the bill, amounted to the sum of \$270,000. The trustees further alleged that the railroad company had failed to pay or provide the sinking fund of 1 per cent. required by the mortgages on the \$1,600,000 of bonds so issued and outstanding, and, that under and in accord-

Record in foreclosure suit of Scott and Cass.

ance with the terms and provisions of said trust deeds or mortgages said bonds had been properly declared and made due as to the principal thereof, because of such defaults on the part of the mortgagor. Said original and supplemental trust deeds or mortgages were filed with and made parts of the bill to foreclose, as Exhibits A and B thereto, and purported on their face to be regularly executed by proper officers of the corporations under proper authority from the company.

The defendant railroad company was duly served with process on the 24th January, 1876, and on the 17th April, 1876, it filed its answer in the cause. In said answer it denied that it was duly and legally organized and incorporated as a corporation, when said mortgages were executed and said bonds issued. It averred that its incorporation and organization was not perfected and completed until January 6, 1873, and that prior to said date it possessed no power or authority to execute and deliver either said bonds or mortgages. It therefore denied that said mortgages were the proper act of the corporation, or constituted any valid lien on its railway and property. The answer, then, by the eighth paragraph thereof, proceeded to set out how and under what circumstances the corporation was formed and organized. Showing that it was legally organized on June 1, 1871, when the agreement of consolidation with the record of the action thereon by the stockholders of the respective companies properly certified by the secretary thereof was filed in the office of the secretary of state of Ohio. But the claim of a want of proper organization was based on the alleged fact that no election of directors was had under the consolidation till January 6, 1873. Said clause of the answer further set out in detail how one Willard S. Hickox, assuming to act in the name of and on behalf of said company, had entered into contracts for the ironing and equipment of said company's lines of road, for which the other contracting party, the Pennsylvania Company, was to be paid in stock and bonds, the latter to be secured by mortgages; and that said original and supplemental mortgages, made a part of complainant's bill, and the bonds mentioned and provided for therein, were the same mentioned and provided for in said agreement of July 20, 1871, between said Pennsylvania Co. and said Hickox, assuming to be president of the said railroad company. The answer admitted that under said contract with the Pennsylvania Co. the latter had "pretended to place the iron and rails upon about 75 miles of the line of said railway, and had put about 47 miles of it in condition for the passage of trains," but claimed that the same are insufficiently and improperly done, and not according to the terms of said contract, which provided that the Pennsylvania Co. should receive, besides stock of the defendant company, \$20,000 in said

bonds per mile as each 10 miles of the road was laid with rails, and ready for traffic. As a further defence the answer set up that said Pennsylvania Co., claiming to be entitled thereto, had on the 4th May, 1872, wrongfully obtained \$1,500,000 of the stock in defendant's company (being more than a majority thereof) under said contract of July 20, 1871, by means of which it secured a majority of the members upon defendant's first board of directors, and still managed and controlled the affairs of said company, etc. And further:

"That on the 4th day of May, 1872, the said complainant Thomas A. Scott, then the president of said Pennsylvania Co. as aforesaid, and acting as one of said trustees, procured and induced the said Willard S. Hickox to deliver to him all of the bonds so executed by said Hickox in the name of defendant as aforesaid. There were 4460 of the bonds so delivered, numbered from 1 to 4460 inclusive, for \$1000 \$200 each, dated October 1, 1871, with interest coupons attached [the coupons maturing April 1, 1872, having been cancelled and cut off]. In consideration of the delivery of said bonds as aforesaid, and simultaneously therewith, as a part of said transaction, the said Pennsylvania Co., by its president, the said Thomas A. Scott, executed and delivered to said Hickox, for the benefit of defendant, a written undertaking, bearing date May 4, 1872, wherein it was recited that said Hickox had delivered to complainant as said trustee the bonds above described under said supposed contract of July 20, 1871, by the terms of which said bonds were to be delivered to said Pennsylvania Co. at the rate of \$20,000 per mile, so fast as material should be delivered to the value thereof, and in full as each ten miles of iron should be laid and the track in condition for the passage of trains; after which recital it was stipulated and agreed by said Pennsylvania Co. in and by said last-mentioned agreement, that in consideration of the delivery of all of said bonds as aforesaid, before said iron was laid, the said Pennsylvania Co. obligated itself to take care of and pay all interest which might become due thereon prior to said line of railway of defendant being in condition for traffic; and it was provided that for all interest so paid for the Pennsylvania Co., and not justly and equitably chargeable thereto, under said contract of July 20, 1871, said Pennsylvania Co. should be reimbursed out of the earnings of defendant's road after the same should be completed in sections under said contract, and begin to make earnings on the respective sections, as required by the terms of said agreement."

The answer further alleged that at the date of the delivery of said bonds said Pennsylvania Co. was entitled to no part thereof; "that said bonds are now held by said Pennsylvania Co. under said supposed contract of July 20, 1871; that if any

of said bonds are held by other parties, they are held in the interest of and for said Pennsylvania Co. None of said bonds are held by *bona fide* owners, but the pretended holders and owners thereof have and are chargeable with notice of all the matters herein set forth, and of all the equities of the defendant arising therefrom." It was further claimed in said answer that the cost of the work done by the Pennsylvania Co. had not exceeded \$7000 per mile; that it had never earned the stock wrongfully delivered to it; nor had it entitled itself to any interest on the bonds delivered as aforesaid. And defendant further averred that the complainants in prosecuting said foreclosure suit were moved by, and acting in the interest of, said Pennsylvania Co. That their object and purpose was to annihilate and destroy so much of defendant's road as lay west of Tiffin in Seneca county, Ohio, and to destroy its stock, that the interest of said trustees, and of said Pennsylvania Co., and of the holders of said bonds, are one and identical, that under said agreement of May 4, 1872, said Pennsylvania Co. were bound to pay the interest alleged to have matured upon said bonds, and the subsequently accruing interest thereon, until the full completion of said road by said Pennsylvania Co. under said contract of July 20, 1871, that complainant Scott, who acted for said company in making said contracts, controls and directs the affairs of said Pennsylvania Co. and the holders of said bonds.

To this answer the complainants duly filed their replication on the 26th day of May, 1876. On the 19th of August, 1876, while the cause was regularly at issue, and all parties in interest were before the court, on the motion of complainants, to which the defendant filed its written consent, an order was made by the court allowing the ties and rails to be removed from one portion of the line and relaid upon another part thereof. Said order, after reciting the written consent of the defendant company thereto, proceeds as follows:

"And it further appearing to the court that the Pennsylvania R. Co. [a separate and distinct corporation from the Pennsylvania Co. referred to in the answer], being the owner and holder of all of the bonds of said Mansfield, Coldwater & Lake Michigan R. Co., has also filed herein its written consent that said motion be granted. And it also further appearing that the interests of said Mansfield, Coldwater & Lake Michigan R. Co., as well as of said Pennsylvania R. Co. as the owner of said bonds, will be promoted by the removal of said ties and rails and the relaying the same as described in said motion, it is therefore ordered and decreed by the court that said motion be, and the same is hereby, sustained. And it is further ordered and decreed that the complainants herein be permitted to enter into such arrangements with the said Coldwater,

Marshall & Mackinaw R. Co. as may be agreed upon between themselves relative to the taking up, removing, and relaying by the last-named company the ties and rails that are now laid and unused on said Mansfield, Coldwater & Lake Michigan R. south-east of and for a distance of about eight miles from Monteith; and, after the same have been relaid on the graded line of said Mansfield, Coldwater & Lake Michigan R. near Coldwater, the said Coldwater, Marshall & Mackinaw R. Co. may use so much of said line as is covered by said ties and rails, for such time, and upon such terms and conditions, as may be agreed upon between said last-named Co. and the complainants, provided that before any such arrangement shall be finally consummated said Coldwater, Marshall & Mackinaw R. Co. shall execute and deliver to said complainants a bond with approved sureties, for not less than the sum of \$100,000, conditioned that all the covenants on the part of said Coldwater, Marshall & Mackinaw R. Co. in respect to the taking up and relaying said ties and rails between Monteith and Coldwater, as well as in respect to the subsequent use of that part of said Mansfield, Coldwater & Lake Michigan R. Co. wherever said ties and iron shall be relaid, shall be fully and faithfully performed by said Coldwater, Marshall & Mackinaw R. Co. It is further ordered that nothing in this decree nor in the agreement that may be made in pursuance hereof shall give said Coldwater, Marshall & Mackinaw R. Co. any rights whatever in relation to the removal of said ties and iron, nor to the use of said railroad wherever the same shall be laid after the termination of this case; nor beyond the time when said Mansfield, Coldwater & Lake Michigan R. Co. may be sold under and pursuant to any other or further orders that may be made by the court herein. It is also further ordered that nothing in this decree, nor in the arrangement that may be hereafter made between the complainants and said Coldwater, Marshall & Mackinaw R. Co., shall in any way interfere with the rights or remedies of the owners of said bonds of the Marshall, Coldwater & Lake Michigan R. Co., nor of the trustees, complainants herein, either in this or any other proceeding that may be brought to enforce the rights of said bondholders or of said trustees, nor in any way to hinder or delay the further proceedings in this case."

On the 3d of November, 1876, the directors of the Mansfield, Coldwater & Lake Michigan R. Co., by resolution instructed their attorneys to withdraw all defence to said suit of Scott and Cass, trustees, Henry C. Hodges, and Stephen B. Sturges, two of said directors, and the former one of the defendant company's attorneys, who signed its answer, entered their written protest against this action of the board of directors. Afterwards, at the January term, 1877, of this court, and on the 3d day of Jan-

uary, 1877, as appears by the record, "came Messrs. Jno. B. Shipman, Henry C. Hodges, and C. H. Scribner, solicitors for the said Mansfield, Coldwater & Lake Michigan R. Co. in the above entitled proceeding, and show to the court here that by resolution of the board of directors of said railroad company, adopted November 3, 1876, the said solicitors were directed to make no further defence on behalf of the said company to the proceedings of the complainants herein; and thereupon the said solicitors withdraw the appearance of said respondent heretofore entered herein, and on their motion it is ordered that they have leave to withdraw the answer of respondent to the bill of complaint of complainants, and the same is now withdrawn accordingly." On the 21st of March, 1877, an order *pro confesso* was taken and entered against said defendant railroad company, and the cause continued to the next term of the court, and on June 27, 1877, a decree was entered finding said company in default in the payment of interest since October 1, 1873, and amounting to \$426,650, also in the payment of the sinking fund as provided by the mortgages, and all other facts material and necessary in a decree in complainant's favor, and directing a sale of the company's line of road and property covered by the mortgages upon its failure, within the time allowed, to pay said indebtedness. The sale was made on the 4th day of August, 1877, when the property was struck off at the price of \$500,000, the minimum price fixed by the court, to Joseph Lessley, who, as it appears, was acting as the agent of the Pennsylvania R. Co., the holder of the bonds and past-due coupons. This sale was confirmed, and the special master commissioner, under the direction of the court, made proper conveyance of the property to the purchaser, who, as appears from the allegations of the bill of complainant Foster, subsequently transferred the same to the Northwestern Ohio R. Co., which was chartered and organized after the date of said transaction, and which is claimed to be only a branch of said Pennsylvania Co., and identical with it.

The present bill seeks to have that decree and sale set aside and vacated as having been fraudulently obtained, and the defendant's answer in said suit reinstated, with leave to complainant and the company to make any and all other defences which they may be able to set up and establish. It is conceded by complainant's bill, now under consideration, that the Mansfield, Coldwater & Lake Michigan R. Co. "were duly and legally created, incorporated, and organized as a railroad corporation of the states of Ohio and Michigan," on or about June 1, 1871. So much of the answer of said company to the foreclosure suit as denied its legal organization and want of power to make the mortgages of

Object of present suit—Defences to foreclosure suit revived.

October 1, 1871, and October 1, 1872, and to issue the bonds secured thereby, may therefore be dropped out of consideration. The other grounds of defence set up in that answer are substantially repeated, and relied on by complainant as entitling him to relief on behalf of the corporation. Of these defences the only one worthy of notice grows out of the contract of May 4, 1872, which, it is assumed, bound the Pennsylvania Co. to pay the interest on the bonds then turned over to it until the full and final completion of said road; and that, the Pennsylvania Co. being so bound, there was no default on the part of the Mansfield, Coldwater & Lake Michigan R. Co., as alleged by the trustees in the foreclosure suit. This defence, whether good or bad, was known to and was set up by the defendant railroad company in the foreclosure suit. Complainant says it was concealed from him and other stockholders, and was not discovered by him till shortly before the bringing of this suit. By whom or how concealed from him is not stated. But the time at which he acquired his knowledge of or information about said contract is not at all material. The corporation in whose behalf he institutes the present suit, and whose rights he is seeking to enforce, was fully aware of the existence of said contract, which was set up and relied upon as a defence in its answer to the foreclosure suit. Complainant's ignorance of its existence, however superinduced, whether by fraudulent concealment or negligence, in no way changes or affects the material fact that the corporation in whose behalf he now interposes labored under no such want of knowledge or information. The corporation, whose rights this suit seeks to protect and enforce, can take no benefit or advantage from the fact that complainant was ignorant of what was well known to the corporation itself, well known to one of its directors and solicitor, Henry C. Hodges, who opposed the resolution of the board directing a withdrawal of the defence. But if this were not so, and if complainant's ignorance of what was known to the corporation could avail the latter in cases like the present, can it be said that complainant's want of knowledge of that contract of May 4, 1872, was excusable? We think not. As a stockholder he was affected with notice of the foreclosure suit, and of the result of that proceeding. He does not intimate in his bill that he did not know of its existence and of the defences interposed thereto by the company. When the property of the corporation, in which he had an interest as a shareholder, was being sold under judicial proceedings open and accessible to his inspection and examination, he is not in position to claim the benefit of ignorance in respect to matters within easy reach of himself and within the knowledge of his company. But aside from this, the court is by no means satisfied that the contract of May 4, 1872, admits of the construction which the defendant

railroad company in the foreclosure suit and complainant in the present suit seek to have placed upon it. Read in the light of the contract of July 20, 1871, and of the supplemental mortgage executed October 1, 1872, the agreement of May 4, 1872, will hardly warrant the construction that the Pennsylvania Co. undertook and agreed to pay interest on bonds which it was entitled to receive by virtue of its ownership of such bonds. The true meaning of the contract seems to be, that the Pennsylvania Co. would pay the interest on all such or so many of said bonds as might be used, and to which it was not entitled under said contract of July 20, 1871. The interest to which it was then or should thereafter be entitled upon bonds earned under said contract, was not to be paid by it. Such an interpretation would be unreasonable. But it might well assume to provide for the interest on said bonds before its own right to the interest accrued, and such is the fair and rational meaning of the agreement. What became of the interest falling due prior to October 1, 1873, does not appear. It is not intimated or suggested in either the answer of the corporation to the foreclosure suit or in the present bill that it was not provided for by said Pennsylvania Co., or that it was paid by the Mansfield, Coldwater & Lake Michigan R. Co.

Again, the court found, as appears from the consent order of August 19, 1876, to which the Mansfield, Coldwater & Lake Michigan R. Co. gave its written assent, that the Pennsylvania R. Co., a corporation separate and distinct from that of the Pennsylvania Co., was the owner and holder of said outstanding bonds and of the past-due coupons from October 1, 1873. Assuming that such was the fact, was the Pennsylvania R. Co., as such holder and owner, bound to look to the Pennsylvania Co. for payment of such interest under the contract of May 4, 1872, between the latter and the Mansfield, Coldwater & Lake Michigan R. Co. This will hardly be insisted upon. The contract of May 4, 1872, if it went to the extent claimed for it by the bill, being only between the Mansfield, Coldwater & Lake Michigan R. Co., and the Pennsylvania Co. might be binding between themselves, but would certainly not require the owner and holder of the bonds and past-due interest to look to the liability of the Pennsylvania Co. thereunder before resorting to the makers and the mortgages executed to secure the payment of his bonds and interest on the same as it accrued. The suggestion of the bill that Thomas A. Scott was the president, and had the practical control of both the Pennsylvania Co. and the Pennsylvania R. Co., is not material. If the bonds had been fraudulently issued within the knowledge of said Scott, his knowledge might have operated as notice to the latter company when it acquired the bonds. But

the case made by the bill, and the defence set up in the answer of the railroad company to the foreclosure suit, does not present the question of a fraudulent issue of bonds, so as to put the holder upon proof of purchase before maturity for value and without notice, but the defence was and is want of complete and full consideration paid or given therefor by the Pennsylvania Co. under the contract of July 20, 1871, which it is claimed was not fully performed by said company. It is conceded, in the answer of the railroad company in the foreclosure suit, that said Pennsylvania Co. put about 47 miles of road in condition for the passage of trains, and that it pretended to place the iron and rails upon about 75 miles of the line of said railway. It is claimed that this was not properly done, that the iron was of inferior quality, the road was not properly ballasted, etc. These facts, if true, might have justified and warranted a counterclaim for damages for breach of contract on the part of the Pennsylvania Co., but they do not impeach or tend to impeach the validity of the bonds in the hands of the Pennsylvania R. Co., who, in the absence of fraud in the issuance of the bonds, is presumed to be an innocent holder for value and before maturity.

Again, the contract of July 20, 1871, imposed certain duties and obligations upon the Mansfield, Coldwater & Lake Michigan R. Co. in respect to preparing and getting the roadbed, etc., ready for the iron. It is not averred in said company's answer to the foreclosure suit, nor in the present bill of complainant, that said undertakings on the part of said Mansfield, Coldwater & Lake Michigan R. Co. were complied with, so as to show that the Pennsylvania Co. was in default on its part, so that want of consideration for the \$1,600,000 of bonds placed in the hands of the Pennsylvania Co. under that contract, and which it is claimed to have averred in the building of 75 miles of said line of railway, is not well pleaded, even as against the Pennsylvania Co.; while in respect to the Pennsylvania R. Co., to whom the bonds were transferred and by whom they were held when the mortgages were foreclosed, the facts presented constitute no defence.

Now, aside from the statements of the company's answer to the foreclosure suit, largely repeated and relied upon in the present bill, what new and extrinsic facts are alleged? There is, first, the allegation that the resolution of the board of directors of November 3, 1876, directing the solicitors of the company to make no further defence to the foreclosure suit, was fraudulent. How and in what way fraudulent is not disclosed except in the most vague and general way. As to Henry C. Lewis and Joseph Fisk, two of the directors of the Mansfield, Coldwater &

New facts alleged—Withdrawing defence to foreclosure suit—Fraud.

Lake Michigan R. Co. when said resolution was passed, it is stated that they were also directors in the Coldwater, Marshall & Mackinaw R. Co., to which said Scott and Cass were to give a large portion of the property of said defendant the Mansfield, Coldwater & Lake Michigan R. Co., to induce said directors to favor a withdrawal of said answer and defence. It is not suggested how Scott and Cass, as trustees, could give to another corporation a portion of the trust property then being foreclosed. It is not intimated that any such arrangement was carried out. It is not charged that Lewis and Fisk, in voting for the resolution, acted upon the inducement so held out to them, which looked to some benefit to another road in which they were directors; nor is it alleged that they held a larger interest in the latter road than in the Mansfield, Coldwater & Lake Michigan R. Co. Corrupt action on their part is barely insinuated, not charged. If this intimation of corrupt action on the part of Lewis and Fisk was based on the provisions of the consent order of August 19, 1876 (as was suggested at the hearing of the demurrer), it is manifestly not well founded. By the terms of that order the ties and rails which were allowed to be removed from one part of the line and relaid upon another were to be used by the Coldwater, Marshall & Mackinaw R. Co. only until the termination of the foreclosure suit, or not beyond the sale of the Mansfield, Coldwater & Lake Michigan R. Hence there was no advantage to the Coldwater, Marshall & Mackinaw R. in Lewis and Fisk withdrawing defence, and allowing an early sale. On the contrary, the interest of the Coldwater, Marshall & Mackinaw R. Co. was in postponing the sale. It is said that Reuben F. Smith, George W. Layng, and Frank James, three other directors of the Mansfield, Coldwater & Lake Michigan R. Co., were employees of the Pennsylvania Co., and, acting in the interests of said company, voted for the resolution of November 3, 1876. This does not charge fraudulent and corrupt conduct on their part. But it is said that said action of the board was "solicited" by Thomas A. Scott in the interest of said Pennsylvania Co., and that J. Twing Brooks, in the same interest, being both a director in the Mansfield, Coldwater & Lake Michigan R. Co. and the general attorney of the Pennsylvania Co., favored said resolution, and aided in securing its adoption. That is no sufficient allegation of corrupt and fraudulent action and conduct on his part. The bill nowhere intimates or charges that the directors voting for said resolution, did so with the knowledge or belief that the facts set up in the company's answer were true or that they constituted a valid and proper defence to the foreclosure suit. It is not intimated, either, that they derived any personal benefit from their action. Both the trustees and several of the directors who participated in said

transaction have since departed this life, and in calling their actions in question in a way to impute turpitude and breach of trust something more is required than vague generalities and insinuations. No specific acts are charged. No specific facts are stated which fairly or by necessary implication make or render the action of the board of directors in withdrawing said defence corrupt or a breach of duty. It is not sufficient, in general terms, to allege on information and belief "that the withdrawal of said defence was the fraudulent act of said Thomas A. Scott and J. Twing Brooks, aided and abetted by such of said directors as voted in favor of said withdrawal." There was no concealment of this action, and after its adoption there was ample opportunity before the final decree for complainant or any other stockholder to have intervened and made defence. Every fact alleged in the bill upon information and belief was then disclosed by the record in said foreclosure suit, or otherwise readily accessible to complainant upon the slightest inquiry or investigation. Under such circumstances and conditions, if it be conceded that a fraud was actually committed against the corporation, the question next arises whether the company or the complainant who seeks to assert its right has not been guilty of such "laches" as to bar his or its right to any relief.

The allegations of the bill in reference to the concealment of the frauds or fraudulent acts relied on for relief are wholly insufficient to have arrested the running of the statute of limitations, in analogy to which courts of equity generally act in considering and testing the question of "laches" in seeking relief. In *Wood v. Carpenter*, 101 U. S. 143, it is said by Mr. Justice Swayne, speaking for the court, that "concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself, . . . and the delay which has occurred must be shown to be consistent with the requisite diligence." This rule was repeated and applied by the supreme court in the equity suit of *Bank v. Carpenter*, Id. 567. It is suggested by counsel for complainant that the rule announced and applied in *Wood v. Carpenter*, Id. 138-143, which clearly establishes the insufficiency of the present bill, is not in harmony with *Bailey v. Glover*, 21 Wall. 346, which has been recognized in the later cases of *Rosenthal v. Walker*, 111 U. S. 185; *Traer v. Clews*, 115 U. S. 528-536; and *Kirby v. Railroad Co.*, 120 U. S. 130-139. But in respect to what will constitute the concealment of a fraud such as will arrest the running of the statute, or excuse delay in seeking relief because of such fraud, no conflict is perceived between the decisions in their applications to the facts of the pres-

Question of
laches—Con-
cealment of
fraud.

ent case. In *Bailey v. Glover*, 21 Wall. 347, Mr. Justice Miller says:

"In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other the statute will not bar relief, provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

All the authorities agree in the proposition that the party seeking to excuse his delay in asking relief on the ground of fraud must show that his ignorance was not negligent. That he remained ignorant without any fault of his own, that he could not by reasonable diligence have discovered the fraud sooner and "that, where the means of knowledge are open to him, he is chargeable with knowledge from the date when he should have ascertained the facts." Now, testing the complainant's bill by these rules, it is clearly insufficient to excuse the long delay that has elapsed since the rendition of the decree in 1877 till the commencement of the present suit in 1887. It is not alleged that during the 10 years of delay that the corporation whose rights are sought to be enforced was ignorant of the alleged fraud committed against it. It is not charged that the complainant's ignorance of the alleged frauds was "produced by affirmative acts" of the guilty parties in concealing the facts from him or other stockholders. It is not stated that during this long period the complainant ever made or caused to be made the slightest inquiry in relation to the transactions now complained of. The facts were all either matters of record in the foreclosure suit or readily accessible upon inquiry. He could have learned in 1877 (if he did not then know), as easily as in 1887, the relation which Scott and Brooks and the directors Smith, Layng, and Janes bore to the Pennsylvania Co., and which Lewis and Fisk bore to the Coldwater, Marshall & Mackinaw R. Co. The resolution of the board of directors of November 3, 1876, was made a matter of record in the foreclosure suit. Two of the directors within easy reach of complainant had protested against that action, and in its answer the company had set up all the defences now relied on by the complainant in its behalf. Under such circumstances, complainant's ignorance, even assuming

**Negligence of
complainants
in remaining
ignorant.**

that his ignorance would excuse delay on the part of the corporation, was negligent. It was not without fault on his part. It is also manifest from the situation of the parties and the history of the transaction as stated by himself, and as disclosed in the contracts and foreclosure proceeding, that by reasonable diligence he could have discovered the alleged fraud sooner; that the means of knowledge were open to him from 1877; and that he must be chargeable with knowledge from the date when he should have ascertained the facts. But the case is far stronger as against the corporation, as to whom it is not alleged that it was during any period of time ignorant of any of the facts now set up as a ground of relief.

Under the facts and circumstances of this case as disclosed by the bill, even assuming the existence of the frauds alleged, such laches are shown as should, in the judgment of the court, defeat the relief sought. Relief sought defeated by laches. This objection to the bill may be taken by demurrer. Thus in *Landsdale v. Smith*, 106 U. S. 391, it was held that a bill is bad on demurrer when it appears therefrom that there has been laches in operating the rights which it seeks to enforce. The bill in the present case is, upon its face, open to this objection. It presents no sufficient excuse for the delay that had elapsed, and, tested by the decision of the supreme court, it must be held bad, and not sufficient to entitle complainant to the relief sought. See *Moore v. Greene*, 19 How. 69; *Burke v. Smith*, 16 Wall. 390-401; *U. S. v. Throckmorton*, 98 U. S. 64-69; *Sullivan v. Railroad Co.*, 94 U. S. 806; *Godden v. Kimmell*, 99 U. S. 201; *Wood v. Carpenter*, 101 U. S. 139-143; *Coddington v. Railroad Co.*, 103 U. S. 409. In this last case relief was sought eight years after sale, and was denied because of laches and the statute of limitation.

Again, the present bill is defective in not showing any valid defence to the foreclosure proceeding which is sought to be opened. As already indicated, the answer which the corporation filed in that suit showed that the Pennsylvania Co. had in fact earned a considerable portion of the bonds placed in its hands; that it had equipped, under the contract of July 20, 1871, from 47 to 75 miles of the Mansfield, Coldwater & Lake Michigan R. Co.'s line of railway, for which it was entitled to bonds to the extend of \$20,000 per mile. It is not pretended in said answer or in the present bill that the Mansfield, Coldwater & Lake Michigan R. Co. ever paid the interest on said bonds or provided the sinking fund required by the mortgages thereon. To the extent of such defaulted interest, sinking funds and bonds, which the holder had the right to treat as due, the trustees in the foreclosure suit were clearly entitled to a decree for the

No valid defence to foreclosure proceeding shown.

benefit of the Pennsylvania R. Co. It is reasonably certain that the amount so due the Pennsylvania R. Co. as the holder and owner of said bonds exceeded the minimum price placed upon the road in the decree, and for which it was sold. The present bill neither negatives this fact nor offers to pay the sum so due. It shows no valid defence to the bonds so earned by the Pennsylvania Co., and which afterwards passed into the hands and ownership of the Pennsylvania R. Co. It is nowhere denied that the Mansfield, Coldwater & Lake Michigan R. Co. accepted the work done by the Pennsylvania Co., and that the bonds were to be given for the work so done. To this extent, then, there was a valid cause of action, which entitled the trustees to enforce the mortgages of October 1, 1871, and October 1, 1872. This equity and lien is in nowise affected by anything appearing in the company's answer to the foreclosure suit, or in the averments of the bill under consideration. The decree, to that extent, could not or would not have been reversed on a direct appeal, as held by the supreme court in *Thomas v. Railroad Co.*, 109 U. S. 525. The rule as well settled that when the decrees of courts possessing jurisdiction of the parties and subject-matter of the litigation are sought to be opened or vacated, merits must be shown; that the party seeking such relief must show the existence of a valid defence, which he has been prevented from asserting because of the fraud or misconduct of the successful party. The Pennsylvania R. Co., for whose benefit, as the holder and owner of the bonds, the foreclosure suit was prosecuted, is not charged with any fraud or misconduct, nor is any case made by the bill showing that it was not entitled to that decree. By complainant's amended bill, filed herein on the 24th February, 1888, it is alleged that the mortgage or trust deed of October 1, 1872, was, after its execution and delivery, altered and changed in a material way by erasing therefrom a reference made to the contract of May 4, 1872. That mortgage was filed as Exhibit B to the foreclosure suit. The company executing it had full opportunity to examine it and discover any changes or alterations made therein, as alleged, but in its answer it made no such claim. The court is unable to see how this fact, if true, can or could have affected the rights of the parties under the mortgage of October 1, 1871. The trustees, if the alleged alterations were made, did not conceal the fact from the corporation. They exhibited the mortgage with the bill, and the corporation made no point on its having been altered or changed. The complainant now, invoking the aid of this court in behalf of that corporation, which knew or could have known the alleged fact in 1876 by simple inspection of the instrument brought directly to its attention, comes forward too late with such a complaint. The suggestion that the

answer of the Mansfield, Coldwater & Lake Michigan R. Co. having been withdrawn under the resolution of November 3, 1876, was not thereafter notice to the complainant and other stockholders, need hardly be dwelt upon. The answer remained on file, and is certified by the clerk of this court as a part of the record in the foreclosure suit, which is made a part of complainant's bill. But aside from this, the answer of Swan Rose & Co. set up precisely the same facts, and defences, as the answer of the Mansfield, Coldwater & Lake Michigan R. Co., and an inspection of that answer would have disclosed to the corporation and its stockholders all the material facts set up and relied upon in the present bill relating to the contract of May 4, 1872, which constitutes the main grounds for the relief now sought. After a careful examination of the matters the conclusion of the court upon the whole case is that the demurrer to the bill should, for the reasons above stated, be sustained. It is accordingly so ordered, and that the complainant's bill be, and the same is hereby, dismissed, at his costs.

WELKER, J., concurs.

Railway Mortgages—Foreclosure Sale—Setting Aside—Laches.—It was held by the supreme court of the United States, in the case of *Harwood v. Cincinnati & C. A. R. Co.*, 84 U. S. (17 Wall.) 78; bk. 21, L. ed. 558, that a delay of five years does not show diligence to justify the overthrow of a decree of foreclosure, under which new rights and interests must necessarily have arisen. The court say: "We are of the opinion also that there has been too great delay in initiating this suit, and that no sufficient excuse is given for it. The sale was made five years before the commencement of this suit, and it is fairly to be inferred from the bill that the plaintiffs were aware of the proceedings as they progressed. Their knowledge of the mortgage sale is expressly admitted. The allegation of ignorance is, in general terms, of the fraudulent acts and arrangements. They do not allege when they acquired the knowledge, nor give a satisfactory reason why it was not sooner obtained. For aught that appears, they have slept upon their knowledge for several years. Without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. This case does not show a sufficient degree of diligence to justify the overthrow of a decree of foreclosure, under which new rights and interests must necessarily have arisen. *Diefendorf v. House*, 9 How. (N. Y.) Pr. 243; *The Key City*, 81 U. S. (14 Wall.) 653; bk. 20, L. ed. 896."

It is said by Justice Harlan, in *Hayward v. Eliot Nat. Bank*, 96 U. S. (6 Otto) 611; bk. 21, L. ed. 855, 858, that "A court of equity, which is never active in relief against conscience or public convenience has always refused its aid to stale demands, when the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced." See *Twin Lick Oil Co. v. Marbury*, 91 U. S. (1 Otto) 587; bk. 23, L. ed. 328; *Marsh v. Whitmore*, 88 U. S. (21 Wall.) 178; bk. 22, L. ed. 482; *Crosby v. Beale*, 84 U. S. (17 Wall.) 336; bk. 21, L. ed. 602; *Badger v. Badger*, 69 U. S. (2

Wall.) 87; bk. 17, L. ed. 836; *Smith v. Clay*, 2 Amb. 645; 2 Story Eq. Jur. sec. 1520. Whether or not the lapse of time is sufficient to bar the remedy sought of necessity, depends upon the particular circumstances of each individual case. *Crosby v. Beale*, 84 U. S. (17 Wall.) 336; bk. 21, L. ed. 602; *Harwood v. Cincinnati & C. A. R. Co.*, 84 U. S. (17 Wall.) 78; bk. 21, L. ed. 558; *United States v. Beebee*, 17 Fed. Rep. 36, 40.

As to when lapse of time bars the remedy sought, see *Sanchez v. Dow* (Fla.), 2 So. Rep. 842; *Cartwright v. McGown*, 121 Ill. 616; *Speck v. Pullman Palace Car Co.*, 121 Ill. 33; *Irish v. Antioch College* (Ill.), 18 N. E. Rep. 768; *Thomas v. Sweet*, 37 Kan. 183; *Hoffert v. Miller* (Ky.), 6 S. W. Rep. 447; *Wright v. Fisher*, 32 N. H. 605; *Barton v. Long* (N. J.), 14 Atl. Rep. 558; *Heirs of Tevis v. Armstrong* (Tex.), 9 S. W. Rep. 134; *Dismal Swamp Land Co. v. Macauley's Adm'r* (Va.), 6 S. E. Rep. 697; *Terry v. Fontaine's Adm'r* (Va.), 2 S. E. Rep. 743; *Curlett v. Newman* (W. Va.), 3 S. E. Rep. 578; *Grosback v. Brown* (Wis.), 40 N. W. Rep. 494; s. c., 5 McCr. C. C. 31; *Hayward v. Elliott Nat. Bank*, 96 U. S. (6 Otto) 618; bk. 24, L. ed. 858; *Crosby v. Beale*, 84 U. S. (17 Wall.) 348; bk. 21, L. ed. 602; *Harwood v. Cincinnati & C. A. R. Co.*, 84 U. S. (17 Wall.) 78; bk. 21, L. ed. 558; *Taylor v. Holmes*, 8 U. S. Supr. Ct. 1192; *Sullivan v. Portland & R. R. Co.*, 4 Cliff. C. C. 226; *Horsford v. Gudger*, 35 Fed. Rep. 388; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 33 Fed. Rep. 440; *York v. Passaic R. M. Co.*, 30 Fed. Rep. 471; *United States v. Beebee*, 17 Fed. Rep. 36, 40; s. c., 4 McCr. C. C. 16; *Credit Co. v. Arkansas C. R. Co.*, 15 Fed. Rep. 45, 53.

Thus it was said in the case of *the City of Chicago v. Cameron*, 120 Ill. 447, that the failure on the part of stockholders to bring suit to have certain illegal issues of bonds cancelled until nearly twelve years had elapsed since the illegal issue of the bonds, does not amount to laches, where in the meantime the railroad company had no assets, the bonds had never in the meantime been asserted against the company, and the project of building the road had utterly fallen through.

Same—Excusing Delay.—If ignorance of the fraud be alleged as an excuse for the delay, it should be specifically set forth when the knowledge of the fraud was first obtained, or should give a satisfactory reason where it was sooner obtained. *Harwood v. Eliot Nat. Bank*, 96 U. S. (6 Otto) 617; bk. 24, L. ed. 858. Judge Caldwell says in the case of *Credit Co. v. Arkansas C. R. Co.*, 15 Fed. Rep. 46, 53; s. c., 5 McCr. C. C. 31, that a general allegation of ignorance at one time, and knowledge at another is of no effect; that if the plaintiff made any particular discovery it should be stated when it was made, time it was, how it was made, and why it was not made sooner. That there must be reasonable diligence, and that the means of knowledge are the same in effect as the knowledge itself." Citing *Wood v. Carpenter*, 101 U. S. (11 Otto) 135; bk. 25, L. ed. 807; *Harwood v. Cincinnati & C. A. R. Co.*, 84 U. S. (17 Wall.) 78; bk. 21, L. ed. 558; *Badger v. Badger*, 69 U. S. (2 Wall.) 87; bk. 17, L. ed. 836.

CENTRAL TRUST CO.

v.

OHIO CENTRAL R. CO. *et al.*

(U. S. Circuit Court, N. D. Ohio W. D., August 29, 1888.)

Railway Mortgages—Car-Trust Lease—Priority.—Where a contract is entered into between the trustee of an alleged car trust and a railway company leasing certain rolling stock to the company, which agrees to pay, for every car and locomotive delivered, an annual rent for a stated number of years, at the expiration of which time the company is to become the owner of the property, which several payments of rent are to be evidenced by obligations of the company accruing at the maturity of said payments, and to be delivered *pro rata* to the lessor at the time of the delivery of the rolling stock together, with coupons for the payment of interest, which rolling stock the evidence shows that the trustee neither owned nor possessed at the date of the lease; that thereafter the railroad company furnished the names of subscribers to the agent of such trustee, and thereupon made out subscription certificates, which were signed by the trustee as cashier, certifying that the holders were entitled to car-trust certificates of a given value when the subscription was paid in full, the money paid in on the subscription certificates being credited thereon and deposited in bank to the credit of the "equipment account" of the company; and when the instalments were all paid the railroad company scheduled the rolling stock under the lease, and the trustee certified the certificates and turned them over to the holders thereof *pro rata*, or in full of their subscriptions, if paid up, the rolling stock being obtained by the company under its own contracts with the builders,—the car-trust certificates are in legal effect mortgage bonds, which are inferior as liens upon the rolling stock to a prior mortgage containing a clause covering after-acquired property,

IN EQUITY. On exception to report of the special master upon the intervening petitions of George J. McGourkey, trustee of car trusts.

Geo. Hoadly and James Irvine for petitioner, McGourkey

Stevenson Burke and Doye & Scott for the Central Trust Co. and the Ohio Central R. Co.

JACKSON, J.—The original or main suit herein was brought by complainant to foreclose certain mortgages executed by the Ohio Central R. Co., January 1, 1880, to secure Facts.
\$3,000,000 of first mortgage bonds and \$3,000,000
of income bonds. The mortgage or trust deed securing the first mortgage bonds conveyed to said Central Trust Co. of New York, as trustee, in very broad and comprehensive terms, all the line of railroad of the mortgagor, with all rights of way, road-bed made and to be made, track laid and to be laid between

the designated terminal points, including all the stations, depot grounds, fences, rails, bridges, sidings, engine-houses, machine-shops, buildings in any way then or thereafter appertaining unto said described line of railroad, "together with all the engines, cars, machinery, supplies, tools, and fixtures now or at any time hereafter held, owned, or acquired by said party of the first part for use in connection with its line of railroad aforesaid." This mortgage, as well as the income mortgage securing the \$3,000,000 of income bonds, was duly recorded. The railroad company made default in paying the interest on said bonds, and the said trustee thereafter, in pursuance of and in conformity with the terms and provisions of said mortgages, commenced proceedings in this court to foreclose said mortgages by a sale of the property covered thereby. Such proceedings were had in the cause as resulted in a sale of the franchises and property of the said Ohio Central R. Co. in the summer of 1885, when, under a scheme of reorganization participated in by a large majority of the bondholders and a considerable portion of the stockholders, said property and franchises were purchased for this account, and then conveyed to a newly organized corporation, called the "Toledo & Ohio Central R. Co.," which thus became the successor of the said Ohio Central R. Co. in and to franchises and property of the latter covered by said mortgages. At or about the time of commencing said foreclosure suit, John E. Martin was, on September 30, 1883, appointed receiver of the road and property of said Ohio Central R. Co., and said receivership continued for the period of 21 months, extending from October 1, 1883, to June 30, 1885. The regularity of these proceedings, not being called in question or in anywise involved in the present controversy, need not be noticed with more particularity or detail.

On April 2, 1884, during the pendency of said foreclosure suit, George J. McGourkey, trustee, filed his two intervening petitions in the cause, alleging that under three certain lease contracts entered into and executed between himself and said Ohio Central R. Co., bearing date, respectively, August 20, 1880, March 1, 1881, and March 1, 1882, he had leased and delivered to said railway company 27 locomotives, 3300 coal cars, and 340 box cars, designated and identified by serial numbers mentioned, and the letters "O. C. C. T." marked thereon, for which the railway company had agreed to pay him certain rentals during the period stated in each lease, when said locomotives and cars were to become the property of said railway company. The petitions, after setting out the terms of said lease contracts, and the payments that had been made thereunder, both by the company and the receiver, alleged that said cars and locomotives had gone into the possession of said receiver, and were then being

used by him in conducting the business of said railroad, and prayed that said receiver be directed by the court either to perform the covenants of said leases by paying the balance due petitioner thereunder, or that he be directed to deliver of said equipment, and pay petitioner for the use thereof; and asking for a reference to a special examiner to ascertain and report the value of such use. On the 18th of June, 1887, said McGourkey, trustee, filed a third petition in the suit, claiming that there was due him as rental under said leases from March 1, 1883, to October 1, 1883, when said equipment went into the hands of the receiver, the sum of \$124,000, which, though accruing before the receivership, should be paid him, because cash assets, personal property, and earnings to a large amount had come into the possession of the receiver, and been applied towards permanent improvements, new equipment, and betterment placed upon the property, etc. The Central Trust Co., complainant in the foreclosure suit, and the Toledo & Ohio Central R. Co., as the purchaser of the mortgaged property sold thereunder, answered said petitions, denying the title of McGourkey, trustee, to the equipment claimed by him, and disputing his right to any rental for the use of the same while in the hands of the receiver. A reference was directed to a special master, who took proof, and reported that the petitioner, McGourkey, trustee, should be paid about the sum of \$80,000 as rental while said equipment was used by the receiver between October 1, 1883, and June 30, 1885, in addition to what had been paid during said period, which amounted to about \$129,600. The petitioner and the complainant, together with the Toledo & Ohio Central R. Co., each filed exceptions to said report; the petitioner claiming that he has a valid title to said equipment, and is entitled to a much larger rental therefor; and the complainant, in behalf of the first mortgage bondholders, and the Toledo & Ohio Central R. Co. in its own behalf, insisting that the title to said cars and locomotives was vested in said Central Trust Co., under and by virtue of the "after-acquired property" clause of the mortgage of January 1, 1880, executed to secure the railway company's first mortgage bonds. That said McGourkey, trustee, under and by virtue of said leases acquired nothing more than a lien upon said equipment, subject to the prior lien and title of said mortgage, and that he is not entitled to any rent or purchase money therefore as against said bondholders or their trustee; but, if mistaken in this view of their rights, that the surplus earnings derived from the receivership, and now in court, amounts to only about \$80,000, and that petitioner should in no event be awarded a greater allowance than such surplus earnings, as any greater allowance would have to be paid out of funds or property belonging to and purchased by the bondholders under

the foreclosure suit. It is conceded by counsel for petitioner, McGourkey (and, as the court thinks, properly so), that complainant and the Toledo & Ohio Central R. Co. are not estopped by anything that has occurred during the progress of the foreclosure suit from setting up the claims they insist upon in respect to said equipment.

But counsel for complainant and the Toledo & Ohio Central R. Co. have gone further, and contended that the leases, under which petitioner asserts his claim to said equipment and to compensation for the use thereof while in the possession of the receiver, were a part and parcel of a fraudulent scheme contrived and put in operation by the pool or syndicate which originally organized the Ohio Central R. Co. It appears that, in 1879, what is called the "\$3,000,000 pool" was formed to acquire and complete certain lines of railroad, which were to constitute the Ohio Central R. Co. This syndicate, through its committee, composed of George I. Seney, Dan P. Eells, and George F. Stone, representing the subscribers to said pool, contracted with Brown, Howard & Co., also members of said syndicate, to acquire and construct the lines that were to form said Ohio Central R. Co.; to organize said company with a capital stock of \$5,000,000, and, when completed and organized, the company's capital stock of \$5,000,000, together with its first mortgage bonds for \$3,000,000, and its income bonds for \$3,000,000, were to be issued. This stock and these bonds, aggregating \$11,000,000, were to be turned over by Brown, Howard & Co. to the subscribers to said pool or syndicate, which was to and did pay to Brown, Howard & Co. the \$3,000,000 for acquiring, completing its lines, and organizing said railway company. Brown, Howard & Co. were also to furnish the road with \$560,000 worth of equipment. They completed and organized the company under this contract, received from the syndicate the \$3,000,000, and turned over to the pool the \$11,000,000 of stock and bonds of the company, which were distributed between members of the syndicate in proportion to their respective subscriptions to the \$3,000,000 pool; the result of the transaction being that the promoters of the enterprise obtained \$11,000,000 of the railway company's securities at and for an actual outlay of only \$3,000,000. The securities so received were at the date of issuance, or very soon thereafter, worth in the market largely more by several millions than the sum of \$3,000,000 paid out therefor. Following this transaction, and as a part of the same alleged fraudulent scheme, it is claimed that said syndicate having control of the railway company adopted and carried into execution a fraudulent plan and contrivance to make a third issue of bonds secured by mortgage

upon the terminal property and facilities of the company at Toledo, and then take said terminal properties out of the operation of the first mortgage made to secure the first mortgage bonds. The report made by the officers of the company under the laws of Ohio, it is claimed, made an entirely different showing from that stated above, and showed ample assets in the company's hands to provide it with all necessary and reasonable equipment, but that, notwithstanding this, the same management, and largely the same individuals, contrived this further fraudulent scheme of making car-trust securities under a guise of leases for the purpose of further defrauding the public and securing still larger profits and advantages to themselves. While the transaction connected with the organization of the company under which the promoters of the enterprise obtained for themselves \$11,000,000 of the company's securities, and while the further transaction in connection with the "terminal mortgage," as it is called, are both open to grave suspicion as to their good faith, and subject to severe criticism, it is not perceived how they can affect the question now under consideration. The pool may have been overpaid, but how does this inure to the benefit of complainant or of the Toledo & Ohio Central R. Co.? The terminal properties at Toledo may by a fraudulent contrivance have been taken out of the operation of the first mortgage, but how can complainant or the Toledo & Ohio Central R. Co., in this proceeding, either have that wrong corrected, or obtain any benefit therefrom? It may be true that the same parties who carried into execution said alleged fraudulent transactions are the same parties who originated the alleged fraudulent contrivance to raise money by means of the present car-trust leases, but the holders of the company's certificates or obligations issued under said leases are or may be entirely different persons, whose rights could hardly be affected (if their securities are negotiable, and were acquired for value before maturity and without notice) by the fraudulent conduct of the contrivers and originators of the scheme. The court does not see that the transactions connected with the organization of the railway company under which the promoters obtained the \$11,000,000 of its securities can be gone into, or has any direct bearing upon the present controversy. Nor is it perceived what effect can be given to the question discussed as to the validity or invalidity of the terminal mortgage in considering and determining the rights of the respective parties in and to the equipment and the rental thereof here involved. These prior transactions will therefore be left out of further consideration and discussion.

We are then brought to the important and controlling ques-

tion in the case, viz., who has the superior right to or lien upon the equipment in controversy,—the petitioner, under the lease contracts, or those represented by complainant and the Toledo & Ohio Central R. Co., under the mortgage of January 1, 1880? The first car-trust lease was executed August 20, 1880, and reads as follows:

Question presented—Terms of car-trust lease.

“LEASE A. .

“Memorandum of agreement made this 20th day of August, A.D. 1880, between Geo. J. McGourkey, trustee, and the Ohio Central R. Co., whereby George J. McGourkey, trustee, agrees to lease to the Ohio Central R. Co., and the Ohio Central R. Co. agrees to hire from him, eight hundred coal cars and fourteen locomotives, bearing the numbers, and to be made by the makers set out in the schedule hereto attached and made a part thereof, marked ‘Schedule A,’ and delivered at Columbus, Ohio, in accordance to specifications hereto annexed, such renting and hiring to be in respect of each of said cars and locomotives for the period of ten years from the date of the delivery of said cars to said railroad company, but subject, however, to the provisions and conditions hereinafter contained. The said rolling stock to be delivered as per the contract of said George J. McGourkey, trustee, with the said makers, but it is understood that the said George J. McGourkey shall in no way be liable for any delay that may arise in delivery of said cars by said makers, and said railroad company may for convenience make the contracts direct with said makers. The rental of said cars and locomotives payable to George J. McGourkey, trustee, lessor or assigns, by the Ohio Central R. Co., lessee, shall be as follows: The gross sum of one hundred thousand dollars on delivery of said cars and locomotives, and ratably in that proportion, counting twenty cars as equal to one locomotive in and for the delivery of any portion thereof to the persons authorized by the said railroad company to receipt for the same, and the receipt of such persons or person shall be final and conclusive evidence of the acceptance of such locomotives and cars to the satisfaction of the lessees, and in addition the full sum of forty thousand dollars (\$40,000.00) in each year from the date of this agreement of lease for the term of ten (10) years, together with interest on such yearly payments at the rate of eight (8) per cent per annum, payable semi-annually on the 1st days of March and September of each year during said term. In case of default in the payment of any instalment or instalments of rent on the day on which the same falls due hereunder, the said lessor or assigns shall have the right at their option to enter upon the

premises of the railroad company to remove any and all locomotives and cars which shall have been delivered to said railroad company under this agreement and have the right to sell the same at public or private sale, and the proceeds to be applied to the payment of any and all instalments of rent for said cars and locomotives for the whole of said term of ten (10) years limited and prescribed by this agreement, whether said instalments shall have then fallen due or not, and notwithstanding said locomotives and cars shall have been taken possession of and removed and sold prior to the expiration of this lease; and if the proceeds shall be more than are sufficient to pay such unpaid instalment of rent with interest and expenses, then the surplus to be paid to the Ohio Central R. Co., but if there should be any deficit, the Ohio Central R. Co. shall be liable to pay such deficit on demand. The lessees to keep said cars and locomotives in proper and complete repair and condition, less the fair wear and tear, and such repair and maintenance to be done to the satisfaction of the agent or engineer of the lessor. That at all times the name, number, and plate, or other marks and signs of ownership of the lessor, to wit, 'Ohio Central Car Trust,' or the initial, to wit, 'O. C. C. T.,' shall be fixed and retained upon each of the cars and locomotives aforesaid for the purpose of making the ownership publicly known, and, in the event of any such marks or signs being destroyed, the lessee will immediately restore the same; and that such other things shall be done as by the counsel of said lessor shall be deemed necessary or expedient for the full and complete protection of the rights of said lessor as owner of said cars. That said cars and locomotives are to be insured against fire to the amount ——— dollars (\$——), and the insurance is to be paid by the lessee, loss, if any, made payable to George J. McGourkey, trustee, as his interest may appear. The lessee shall replace any cars and locomotives lost by fire, and in that case it shall receive from the lessor the amount collected from the insurance company or companies on such loss. The several payments to be paid for rental to be evidenced by obligations of the lessee due at the time of maturing said payments, as defined by this lease, and delivered *pro rata* to said lessor at the time of the delivery of said rolling stock, with coupons for the interest payment hereinbefore provided for.

"And the Ohio Central R. Co. covenants and agrees to perform the agreements and undertakings in its behalf contained herein, and to pay promptly each and every obligation so to be given thereunder; and it is further agreed that in consideration of such several hereinbefore specified payments during the said term of ten (10) years, and all other sums of money due hereunder, and interest which may have accrued thereon, being

fully paid to the lessor, and in consideration of ten (10) cents for each and every of said cars and of one (1) dollar for each and every locomotive being also paid by the lessee within thirty (30) days after the expiration of said term of ten (10) years, that then the said rolling stock, as described herein, shall become and be the absolute property of said lessee, without further conveyance or transfer. The said lessee agrees to pay the lessor or assigns not to exceed one hundred dollars per annum for the expense of an agent or engineer to examine the said cars. The lessee agrees to pay the expense of preparing the obligations to be given for the rental.

"In witness whereof, the said parties hereto have hereunto set their hands and seals this 20th day of August, A.D. 1880.

"GEO. J. MCGOURKEY. [Seal.]

"THE OHIO CENTRAL RAILROAD COMPANY,

[S. L.]

"By SAMUEL THOMAS, Vice-President.

"B. G. MITCHELL, Secretary."

The lease contracts of March 1, 1881, and March 1, 1882, called, respectively, "Lease B, No. 1," and "Lease B, No. 2,"

Other lease contracts.

were in substantially the same form, and contained substantially the same provisions, differing only as to the number of cars, amount of rental, and time of payment. They need not be set out in full. What is said in reference to Lease A will apply in all respects to each of them. Neither of said agreements were ever recorded. No schedule or schedules, as referred to therein, were attached to the instruments at the time or times of their respective execution and delivery. When Lease A was executed and delivered, neither McGourkey, trustee and lessor, nor the beneficiaries thereunder, if any such existed, either owned or possessed any cars and locomotives, as therein described and purported to be leased. Neither had he or his *cestui que trust* any existing contracts or arrangements with others for the making, building, or furnishing such cars or locomotives, either to said trustee or to the railway company. The transaction, as detailed by the trustee, McGourkey, and B. G. Mitchell, secretary of the Ohio Central R. Co., who acted as the agent of said McGourkey in carrying out the plan, was in brief this:

After the execution of the lease certain officers of the railway company (Messrs. Eells, Brice, and Seney) would furnish to said Mitchell the names of the subscribers to the fund. Transaction as to making car-trust leases. Mitchell would thereupon make out a subscription certificate, which was signed by the Metropolitan National Bank of New York, as fiscal agent, or by McGourkey, cashier, certifying that the holders would be entitled to so many thousand dollars of the car-trust certificates, when the subscrip-

tion was paid in full. The money paid in on said subscription certificates was credited thereon, and was deposited by said Mitchell in the Metropolitan National Bank to the credit of an account called the "Equipment Account of the Ohio Central R." When the instalments were all paid on these subscription certificates, and the general manager of the railway company furnished the trustee with a schedule of the number and marks of the equipment which the company had in its possession, and which it intended should be covered by and included in said lease, the trustee would certify the company's car-trust certificates or obligations, which said Mitchell would turn over to the holders of subscription certificates *pro rata*, or in full of their subscription, if then paid up. By the terms of the lease "the several payments to be paid for rental to be evidenced by obligations of the lessee due at the time of maturing of said payments, as defined by this lease, and delivered" *pro rata* "to said lessor at the time the delivery of said rolling stock, with coupons for the interest payments hereinbefore provided for." These car-trust certificates or obligations of the company so issued after it had obtained rolling stock under its own contracts and arrangements with car builders or constructed by itself, were, in legal effect and operation, mortgage bonds, with coupons for interest attached. The fund thus deposited in the Metropolitan National Bank to the credit of the "equipment account of the Ohio Central R.," was from time to time placed within the reach and control of D. P. Eells, the president of the railway company, in the following manner: Said Eells was president of the Commercial National Bank of Cleveland, Ohio, where he resided. Mitchell, the secretary of the railway company, was a clerk in the Metropolitan National Bank, and attended to all the details of the business for McGourkey, trustee, who was also cashier of said Metropolitan Bank. When Eells needed said funds for use of the railway company, Mitchell would transfer the same to the credit of the Commercial National Bank of Cleveland, and charge said "equipment account of the Ohio Central R." Then the Commercial National Bank would credit the amount to the Ohio Central R. Co., which kept a general account with said Commercial Bank. Said account of the railway company in said Commercial National Bank was made up of discounts made for it by said bank and of amounts so transferred to its credit from the "equipment account" fund. In what proportion the amounts standing to the credit of the railway company in the Commercial National Bank from time to time were made up of such transfers of credit, and of discounts made directly to or for the company, does not appear from anything disclosed in the evi-

dence. Much of the equipment in controversy, after the same was received by the company under contracts between itself and the car builders, were paid for out of those funds and deposits standing in the Commercial National Bank of Cleveland to the credit of the Ohio Central R. Co.; the checks or drafts on which such payments were made, rarely, if in any instance, indicating that the payment was made for or on account of the car trust or of McGourkey, trustee. The account standing in the Commercial National Bank of Cleveland to the credit of the railway company was also checked or drawn upon from time to time for the general purposes of the company other than in the purchase or payment for equipment. The evidence does not disclose the existence of any organized car-trust company or association for whom McGourkey was to act as trustee, and who was engaged in the business of buying or constructing cars to be leased or sold conditionally to railroad companies. The so-called "car-trust association" were merely the subscribers who agreed to take and pay for bonds with interest coupons attached, to be issued by the railway company, and be secured by mortgage upon certain described rolling stock which the company expected and intended to construct or acquire by purchase, and which it was to designate after being acquired by including it in a schedule to be furnished the trustee. Until such schedule was made by the railway company and furnished to the trustee to be attached to the so-called "lease," that instrument was wholly incomplete and inoperative. Lease "A" recites that the Ohio Central R. Co. "agrees to hire from him [McGourkey] 800 coal carts and 14 locomotives, having the numbers and to be made by the makers set out in the schedule hereto attached and made a part hereof, marked 'Schedule A,' and delivered at Columbus, Ohio, in accordance to specifications hereto annexed," etc. No schedule was attached when said instrument was executed and delivered. No specifications were thereto annexed; nor does it appear that any cars were ever delivered at the place designated. On the 23d of February, 1881, six months after the execution of Lease A, Hadley, the general manager of the railroad company at Toledo, Ohio, appears to have furnished the trustee with the following statement:

" SCHEDULE A.

"Description of locomotives and coal cars owned by Ohio Central Car Trust Co., and leased by G. J. McGourkey, trustee and lessor, to the Ohio Central R. Co.

"14 locomotives marked 'Ohio Central C. T.' Numbered 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30. 800 coal cars marked 'Ohio Central C. T.,' numbered, viz.:

From	100 to 300, inclusive,	-	-	-	-	-	201 cars.
"	758 to 800,	"	-	-	-	-	43 "
"	1044 to 1405,	"	-	-	-	-	362 "
"	1406 to 1599,	"	-	-	-	-	194 "
Total,							800

" Received the above-described locomotives and cars.

" G. G. HADLEY,

" General Manager, O. C. R. Co.

" *Toledo, O., February 23, 1881.*"

—Which was thereafter attached to said lease agreement of August 20, 1880. The fourteen locomotives referred to in said schedule, except Nos. 29 and 30, were received and went into the service of the company between December 20, 1880, and February 5, 1881. Nos. 29 and 30 were not received by the company till March 3, 1881. It appears from the evidence that these locomotives were purchased or received by the railway company from the Brooks Locomotive Works of Dunkirk, N. Y., under contracts entered into in July, 1880, prior to the execution of Lease A. By the terms of these contracts between the railway company and the locomotives works, four locomotives were to be delivered in July, 1880, three in September, 1880, five in December, 1880, and five in January, 1881. While the contract was being executed, and after a portion of the engines had been delivered, G. G. Hadley, the general manager of the Ohio Central R. Co., under date of September 29, 1880, wrote the contractors as follows: "We desire to place upon 14 of our new locomotives, now under construction by you, the following: 'Ohio Central C. T.' This should be upon a small plate, placed so as to be removed easily." There is no evidence to show that said fourteen engines so marked, and subsequently included in said Schedule A, were paid for out of the fund paid into the Metropolitan National Bank by the subscribers to the car-trust certificates, which by the terms of the lease were not to be issued by the company till after said schedule was attached to the lease, or until after the locomotives were received and in possession of the company. But it does appear from defendant's Exhibit No. 79. that said locomotives, numbered from 17 to 28, inclusive, were paid for by the Ohio Central R. Co. by drafts of Hadley, its general manager, upon H. P. Eells, the assistant treasurer of the railroad. There is no evidence as to how the 606 coal cars, embracing the Nos. 100 to 300, inclusive, 758 to 800, inclusive, and 1044 to 1405, inclusive, were acquired, or when paid for, or out of what fund. These 606 cars were mostly received by the railroad company during the fall of 1880. As to the remaining 194 coal cars, embracing Nos. 1406 to 1599, inclusive, the contract for their construction was made by and in the name of the

Ohio Central R. Co. with the Peninsular Car Works of Detroit. By the terms of the contract, which bore date September 1, 1880, said cars were to be delivered, not at Columbus, as provided in the lease, but at Toledo, Ohio, and were to be paid for by the railroad company at the price of \$410 for each car in cash, on the delivery of each lot of twenty-five cars. They were, in compliance with the contract, so delivered to and received by the railroad company between October 1, 1880, and December 16, 1880. These 194 coal cars were paid for by the Ohio Central R. Co.; the drafts therefor being drawn by Mr. Andrews, the assistant treasurer of the company at Toledo, where the cars were turned over to the company. Under date of September 6, 1880, Hadley, the general manager of the Ohio Central R. Co., instructed the contractor to mark said 194 coal cars "Ohio Central," in large letters, and on the end of the sill in small letters, "Ohio Central C. T." In contracting for, receiving, and paying for these cars and locomotives embraced in Schedule A, which was certified by the general manager of the road on the 23d of February, 1881, months after the cars went into the possession of the company, no agency relation was disclosed by the railroad company. On the contrary, the car builders dealt with it as the only real principal, and were paid by it in the ordinary and usual course of business, so far as the evidence goes.

We come next to what was done under Lease B, No. 1, which purported to lease to the railroad company 1400 coal cars. This lease was a separate and distinct transaction from the first. It was executed March 1, 1881, to secure the payment of what is termed therein "trust-certificate obligations" of the company to the amount of \$800,000, in 10 annual instalments, with interest thereon, beginning with the 1st day of September, 1884. These annual payments are designated as the rental which the railroad company, as lessee, was to pay for the 1400 cars, and, when paid, the title to the cars was to pass from the lessor to the so-called "lessee." The obligations sought to be secured in and by said lease were ordinary coupon bonds of the Ohio Central R. Co., which were "to be delivered to the said trustee" *pro rata* "at the time of the delivery of said coal cars." Neither the trustee nor the parties who should thereafter become the beneficiaries or *cestui que trust* under the lease, owned or possessed any cars, as therein described, at the time of entering into said lease agreement; nor was any schedule thereof attached to said lease at the date of its execution. On the 9th of December, 1881, nine months after the lease was executed, the following statement was made out by the general manager of the railroad company, and furnished the trustee, to be attached as Schedule A to said lease:

*"Ohio Central R. Co. Office of the General Manager.**"TOLEDO, O., Dec. 9, 1881.*

STATEMENT A.

"Showing Ohio Central Cars covered by car trust.							
"No. 2. Series B.							
Nos. 1600 to 2599, inclusive,	-	-	-	-	-	-	1000 cars.
" 2600 to 2799	"	-	-	-	-	-	200 "
" 4000 to 4049	"	-	-	-	-	-	50 "
" 4050 to 4199	"	-	-	-	-	-	150 "
Making a total of							1400 cars.
"The above-described Ohio Central Cars have all been received and are now in service.							
G. G. HADLEY,							
"Gen'l Manager, O. C. R. Co."							

Now, what is the history of these cars? The 1000 cars numbered 1600 to 2599, inclusive, were constructed by the Peninsular Car Works, of Detroit, under a contract made with and in the name of the Ohio Central R. Co., bearing date January 1, 1881. Under date of February 1, 1881, Mr. Hadley, the general manager of the Ohio Central R., instructed the builders to number said cars 1600 to 2599, inclusive, and to letter them "Ohio Central" in large letters, and "Ohio Central C. T." in small letters, on sills. It thus appears that these 1000 cars were not only contracted for by the railroad company, but were directed to be numbered and lettered as being embraced within a car trust which had not then been executed, or even created. The cars were then sought to be brought within the operation of Lease B, No. 1, a month before said lease had any existence. Many of these cars were actually received by the railroad company before the execution of said lease. They went into possession of the railroad company under said contract with the builders at different dates between the 26th of February, 1881, and the early fall of 1881. These cars were paid for by the Ohio Central R. Co., so far as the proof goes, partly in drafts drawn by the auditor of the company on H. P. Eells, its assistant treasurer, and partly by the note of the Ohio Central R. Co. It is not shown that any portion of the fund raised on the obligations of the railroad company attempted to be secured in and by said Lease B, No. 1, were applied in paying for said cars. We come next to the 250 cars numbered from 2600 to 2799, inclusive, and 4000 to 4049, inclusive, embraced in said schedule. These were built by the Michigan Car Co. under contract with and in the name of the Ohio Central R. Co., entered into December, 1880. They were to be paid for on delivery of each 25 cars. They were delivered to and received by the railroad company between April 30 and August 30, 1881. Under date of February 1, 1881, Hadley, the general

manager of the Ohio Central R. Co., wrote the Michigan Car Co. as follows:

"GENTS: The new cars being constructed by you for this company will be numbered, viz.: 2600 to 2799, inclusive, 4000 to 4049, inclusive, lettered 'Ohio Central' (as per sample car), 'Ohio Central C. T.' (in small letters on side sill)."

Here again the contract for the cars and the lettering antedated the existence of the lease or contract under which they were afterwards, in December, 1881, attempted to be brought by the schedule which the general manager then made out. But how were these 250 cars paid for? It is clearly shown by Mr. Anderson, the treasurer of the Michigan Car Co., that they were paid for by the Ohio Central R. Co.; the mode of payment being by drafts of said railroad company on its assistant treasurer. These drafts were sent to the builders by the assistant treasurer of the railroad company along with receipts or vouchers for the payments, which the builders would sign, and return to the officers of the railroad. The remaining 150 cars, numbered 4050 to 4199, were built by the Peninsular Car Co. under contract with and in the name of the Ohio Central R. Co., said contract bearing date February 11, 1881, and were paid for by the said railroad company; the builders receiving payment from H. P. Eells, the assistant treasurer of the railroad, and from the Commercial National Bank of Cleveland on drafts of the company. No instructions appear to have been given as to numbering or lettering these 150 cars, which were received and went into the possession of the railroad company in November, 1881.

It is urged on behalf of petitioner that the railroad company in making said contracts for this equipment acted, under the provisions of said leases, as the agent of the trustee. It is true that D. P. Eells makes that statement in deposition in a general way, but it is manifestly incorrect or untrue, because the contracts were in almost every instance made in advance of the creation of the so-called "agency." They antedated the leases which undertook to make the railroad company act as agent for the trustee.

Let us next consider the transactions which were had under Lease B, No. 2, executed March 1, 1882, which purported to lease to the Ohio Central R. Co. 2500 coal cars, 340 box cars, and 13 locomotives. The petitioner claims that 1100 coal cars, together with the thirteen locomotives and 340 box cars, were delivered by him to the company under this agreement, which, like the other leases, undertook to designate the equipment leased by Schedule A, thereto attached. The so-called "rental" to be paid under this lease was \$180,000 annually, beginning on the 1st of March, 1885, and running to the 1st of March, 1894, both

inclusive. This rental, for reasons stated in the petition, appears to have been reduced at some time to \$100,000 per annum. When this instrument was executed neither the trustee, McGourkey, nor the parties who might afterwards become the holders of the railroad company's obligations, therein described and intended to be secured, either owned or possessed the cars and locomotives which the trustee purported to lease; nor was any schedule of the cars attached to the instrument at the date of its execution, but at some subsequent period (the exact time does not appear) there was made out and forwarded to said trustee by some one the following statement:

"Ohio Central Railroad Company. (Memorandum.)

SCHEDULE A.

Ohio Central Railroad Car Trust Assignment. TOLEDO, O., 188 .

SERIES B.

12 Locomotives, Nos. 31 to 42, inc. }	
1 " Bucyrus. }	
Coal Cars, Nos. 1600 to 2599, inc.	1000
" " 2600 to 2799, "	200
" " 4000 to 4049, "	50
" " 4050 to 4199, "	150
" " 4200 to 5299, "	1100
Box Cars, " 3160 to 3499, "	340
Total,	2840"

—Which petitioner exhibits with said Lease B, No. 2, and claims to be a part thereof and descriptive of the equipment covered thereby; 1400 of the cars embraced therein being Nos. 1600 to 2799, inclusive, and 4000 to 4199, inclusive, were embraced in Lease B, No. 1, and have already been considered. What is the history of 1100 coal cars, numbered 4200 to 5299, inclusive, embraced in said schedule? On the 22d of October, 1881, the Ohio Central R. Co. contracted with the Peninsular Car Co. to construct said cars, which were to be delivered to the company at Toledo, during the latter part of 1881 and first of 1882. On the 15th of November, 1881, Hadley, the general manager of the railroad company, instructed said car company to number said 1100 cars 4200 to 5299, inclusive. On the 25th of November, 1881, when the cars were being delivered and received, the Ohio Central Car Trust Association, "Series B," was substituted as the contractor for said cars in place of the Ohio Central R. Co., under the following agreement, viz.:

"This contract of Oct. 22, 1881, is by mutual consent this day modified in the following particulars:

"1st. The Ohio Central R. Co. is released from the same, and

the Ohio Central Car Trust Association, 'Series B,' is substituted as the party of the second part.

"2d. The number of cars to be manufactured is reduced from eleven hundred and sixty to eleven hundred.

"3d. Payment for cars is to be made at the option of the second party in cash on delivery in lots of one hundred cars each, or in the paper of the second party, indorsed by Geo. I. Seney and Dan. P. Eells, at sixty days from the date of delivery of cars in lots as above at Toledo.

"In case of paper being given, interest is to be allowed at the rate of six per cent. per annum.

"THE PENINSULAR CAR WORKS OF DETROIT.

"By FRANK J. HECKER, Vice Pres't and Man.

"THE OHIO CENTRAL R. CO.,

"By DAN. P. ELLIS, President.

"G. J. MCGOURKEY, Trustee.

"OHIO CENTRAL CAR TRUST, SERIES B.,

"By D. P. EELLS.

"*Cleveland, Nov. 25, 1881.*"

The "Dan. P. Ellis" who signed said agreement for and in behalf of the Ohio Central R. Co. is and was the same individual as "D. P. Eells," who executed it for the Ohio Central Car Trust Association, which was purely an ideal and imaginary concern so far as Lease B, No. 2, now under consideration, was concerned. That car trust under which these cars are now claimed was not then formed, and in respect to that there was no such Ohio Central Car Trust Association as that for which the said Eells undertook to agree with himself as president of the railroad company. This singular transaction occurring in advance of the execution of Lease B, No. 2, which formed, if formed at all, the car trust association, whose trustee now claims said cars under that lease, is open to much comment and unfavorable criticism. It presents itself in the questionable form of a preparation in advance to deal with property for which the company had contracted, and which was then being furnished it in some illegitimate or irregular way. Except 200 of said cars received in March, 1882, the entire number were received by the railroad company on and prior to February 9, 1882. How and by whom were they paid for? This does not clearly appear. Notes to the amount of \$489,500 were given the car company for the cars as each 100 were received by the railroad company. Said notes, except one for \$44,500, given March 10, 1882, at 63 days, all bore date, and many of them matured prior to, March 1, 1882. They were in the following form:

"\$44,967.25.

TOLEDO, O., Dec. 6, 1881.

"Sixty days after date, the Ohio Central R. Car Trust Association, Series B, promises to pay to the order of Dan. P. Eells and Geo I. Seney, forty-four thousand nine hundred and sixty-seven 25-100 dollars at the Metropolitan National Bank, New York.

"Value received.

Certified Feb. 7, 1882.

"METROPOLITAN NATIONAL BANK.

"Ohio Central R. Car Trust Ass.

"By G. G. HADLEY, Agent.

"No. — Due —"

—But by whom paid or out of what fund does not appear. Such of said notes as matured and were paid prior to March 1, 1882, were not paid out of the funds realized on the company's obligations secured in and by said Lease B, No. 2. In respect to the 340 box cars included in Schedule A to Lease B, No. 2, it does not appear how or from whom they were acquired by the railroad company, nor how or out of what fund they were paid for. Many of them were received by and in the possession of the company before Lease B, No. 3, was executed. As to the 13 locomotives embraced in said schedule, the following facts appear: The locomotive called "Bucyrus" was an old engine that belonged to the Ohio Central R. Co. It was repaired in the company's shop, with the company's material, and by employees in the service and pay of the railroad, and was sold by the president of the company to said McGourkey, trustee. It had been repaired and returned to service prior to the execution of Lease B, No. 2. Four other locomotives included in said schedule, being Nos. 39 to 42, inclusive, were built by the Ohio Central R. Co. in its shops at Bucyrus, with its own material, and by its own labor; and after being completed and in the service of the company they were transferred to said car trust. The mode and method of doing this is shown in plaintiff's exhibit. The proceeds of the sale of these five engines, which were clearly the property of the company, were largely used by the president, Eells, in paying off a note of the railroad company, on which he was endorser. Locomotives numbered 31 to 35, inclusive, as shown by defendant's exhibit, were billed to Brown, Howard & Co., the contractors under the construction contract, who were bound to furnish \$560,000 worth of equipment to the company, and were paid for by two checks and three ten-day drafts drawn by Hadley, the general manager of the railroad, on Watson H. Brown & Bro., of New York, bankers for Brown, Howard & Co. These locomotives were paid for on the 30th of December, 1881, and January 4, 1882, before car trust, Series B, No. 2, was executed or had any existence. The remaining locomotives, Nos. 36 to

38, inclusive, were billed to the Car Trust Association Ohio Central R., under date of May 4 and 6, 1882, and appear to have been paid for by drafts of Brown, Howard & Co. on G. J. McGourkey, trustee Ohio Central Car Trust, at Metropolitan National Bank, New York; the date of payment being May 27, 1882.

Now, in the light of the foregoing facts relating to the equipment in controversy, and to the situation of the parties engaged in the transactions embodied in said lease contracts, what is the proper construction to be placed upon said instruments, and what is their true character? Are they what on their face they purport to be, "leases," by the trustee, or those represented by him, of equipment owned by him or them? Or are they merely mortgages of the Ohio Central R. Co., contrived and designed to cover rolling stock which it might subsequently acquire, and intended to secure to parties who would take its obligations called "Car-Trust Certificates," the repayment of the money advanced the company thereon? It is well settled that neither the name which the parties may give to an instrument, nor any particular provision, disconnected from all others, will determine the true character of the contract, but that the ruling intention of the parties, as gathered from the whole instrument, the situation of the subject-matter of the contract, and the circumstances surrounding the transaction, must be looked to in order to ascertain and determine its true character and meaning. Thus in *Heryford v. Davis*, 102 U. S. 235, a manufacturer of cars contracted to "loan" certain cars to a railroad company "for hire" at a stipulated price, payable in certain instalments, for which the railroad company executed its notes, on the payment of which the car company was to "relinquish" the cars to the railroad company. It was also agreed that upon default on any of the notes the car company might, at its option, retake the cars and sell them, retaining for its own use all payments received up to that time, and keeping the amount unpaid out of the proceeds and returning the surplus, if any, to the railroad company. In construing this contract, Mr. Justice Strong, speaking for the court, said:

"It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account. Though the contract industriously and repeatedly spoke of loaning the cars to the railroad company for hire for four months, and delivering them for use for hire, it is manifest that no mere bailment for hire was intended. . . . It appears equally clear to us that the contract was not one for a conditional sale."

And after reciting the provisions of the contract the court proceed:

Whether instruments are leases or mortgages.

"In view of these provisions, we can come to no other conclusion than that it was the intention of the parties, manifested by the agreement, that the ownership of the cars should pass at once to the railroad company in consideration of their becoming debtor for the price. Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of a sale."

In *Frank v. Railroad Co.*, 23 Fred. Rep. 123, Hallett, J., in discussing a contract of similar character, said :

"These instruments in the form of leases, and having somewhat the aspect of conditional sales, were a disguise of the real transaction between the parties. The rolling stock was not at any time owned or held by the parties assuming to lease the same, or by any one represented by such parties. Under the first contract the 'Philadelphia & Colorado Equipment Trust,' an association of shareholders to the amount of \$500 each, furnished money with which the railroad company either bought or constructed cars and locomotives for its own use. In like manner, under the contracts with the Rio Grande Extension Co., the railroad company bought or constructed rolling stock for its own use with money furnished by shareholders through the Guarantee Trust and Safe Deposit Co., to be returned with interest from the payments made under the contract by the railroad company. Thus it appears that the payees of these instruments cannot stand in the character assumed by them of lessors of the rolling stock, and, in so far as they may have any position in the law, they are to be regarded as mortgagees of the property."

In the present case the instruments under which the petitioner claims were clearly not contracts of bailment, contemplating merely the use of the equipment by the railroad company. The provisions of the contracts are wholly inconsistent with such a construction. Neither can the contracts be regarded as conditional sales of the rolling stock described therein, for the reason that such rolling stock was not at the time owned or held either by the trustee or those whom he might thereafter represent as the holders of the obligations issued by the railroad company and intended to be secured in and by said instruments. These obligations, called "Car-Trust Certificates," but in reality the coupon bonds of the Ohio Central R. Co., were not executed and delivered as evidence of the purchase-money price of the rolling stock, which the railroad company was buying from the lessor, who had no such rolling stock to sell, but they were the evidence of the company's indebtedness for money advanced for its use. It is true that the fund so advanced was to be used in the purchase, construction, or acquisition of

**Instruments
not contracts
of bailment
nor conditional
sales—Their
nature.**

equipment for the railroad company, and the obligations of the railroad company given for the repayment of the funds so furnished were to be secured by a lien on the rolling stock of the company. The payers or holders of these obligations, or their representative, McGourkey, trustee, cannot stand in the character assumed by him, or them, of lessors of this rolling stock. The subscribers to the fund advanced to the company, and for which its obligations were issued, occupy simply the position of mortgagees, and the so-called "leases" constitute at best nothing more than a lien or security in the nature of a mortgage for the repayment of advances made the railroad company, and which its obligations given for the so-called "rental" were intended to repay. These mortgages made to secure the payment of its obligations, so incurred, covered and embraced, as we have already seen, rolling stock and locomotives to a large amount, which the company had previously contracted for, received and paid for, or constructed itself with its own material and labor. In respect to such rolling stock and engines thus previously contracted for by the company, and by it received and paid for, and also in respect to the five engines built at its own shops, with its own labor and material, and which after completion, as Eells, the president of the railroad company, states, were "conveyed" to the car-trust people, who paid for them after they were finished and in the possession of the railroad, it is clear that the complainant, the Central Trust Co., has the superior or paramount lien under the "after-acquired property" clause of the mortgage executed by the company January 1, 1880, to secure its first-mortgage bonds. In reaching this conclusion as to the true character and construction of said "leases," and of the relative rights of the trustee thereunder, and of the complainant under the "after-acquired property" clause of its mortgage, the court is not unmindful of, nor does it intend to disregard, the principle announced by the supreme court in *U. S. v. Railroad Co.*, 12 Wall. 362, that the rights of a party furnishing rolling stock to a railroad company, whether he retains the title thereto under a conditional sale or merely stipulates for a lien thereon for unpaid purchase money, are superior to those of a prior mortgagee claiming a lien upon or title to such rolling stock as "after-acquired property." It is not questioned that "a mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands." But as regards the bulk of the equipment in controversy, that principle does not avail or benefit the petitioner, for, as already shown, neither he nor those he represents had any title to or lien upon such portion of the rolling stock when the same came into the possession and control of the railroad company.

It is claimed for the petitioner that although the cars and locomotives in question were in most instances built for the railroad company under contracts made with the company and in its own name, and were first received by the company and paid for by its officers in the usual and ordinary course of business, the money so used in paying for the equipment came from the fund advanced by the subscribers for the car-trust certificates of the company, and that this use of the fund so raised created an equitable lien or resulting trust in or upon such rolling stock, which would be prior in right to the lien of complainant. Under the contracts for the construction of the equipment the cars were to be and were paid for on or after delivery to the railroad company. Now, so far as the petitioner's rights depend upon the assertion of an equitable lien or resulting trust (if such a trust can be set up and enforced in respect to personal property) growing out of the alleged fact that the funds of his *cestui que trust* were used and applied in paying for this equipment, the burden of proof is upon the petitioner to show the particular car or cars and locomotives which were so paid for. He must trace his so-called "trust funds" into the identical cars and locomotives on which he asserts his equity or lien. This he has utterly failed to do, with the exception of the three engines Nos. 36, 37, and 38, in Schedule A to Lease B, No. 2. The evidence fails to show what particular cars and locomotives were paid for with the funds subscribed for the company's car-trust certificates, which were, in legal effect and operation, bonds of the company. But even if it had been or could be shown that funds raised as these were and placed to the credit of the "equipment account of the Ohio Central R. Co.," and thence transferred to the credit of the company itself, were actually employed in paying for certain specific cars, it is still doubtful whether, in respect to such cars, the petitioner would thereby establish a right to a lien thereon superior to that of the complainant. The transactions involved in these so-called "leases" and the several car trusts formed thereunder, when analyzed, amount in substance and effect to nothing more than this: that money was loaned the company, for which it was to execute its bonds, which were to be secured by mortgage upon its rolling stock, such rolling stock to be selected and designated by itself at some future day, out of its general stock of equipment, and by its statement, called a "schedule," be attached to said mortgage. It was thus left to the officers of the company, many of whom, with its president, were interested in said car-trust certificates, to determine and indicate what cars and locomotives should come within the operation of these mortgages miscalled "leases." If a transaction of this character, and conducted as this business was, can be sus-

Creation of
lien or result-
ing trust on
rolling stock.

tained, and held to confer superior rights to the lien of prior mortgages containing "after-acquired property" clauses sufficiently broad to cover the same property, then such "after-acquired property" clauses of mortgages will become idle and useless provisions, because by the easy contrivance of so-called "car trusts" and "car-trust certificates" of the mortgagor, all subsequently-acquired property may be readily taken out of their operation. The present is readily distinguishable from that class of cases in which car companies, or manufacturers or other actual owners of cars, lease or conditionally sell, or sell absolutely, with lien retained for purchase money, certain equipment to railroads. It discloses a new contrivance for raising money and floating additional mortgage securities of railroad companies, which practically destroys all benefit of the "after-acquired property" clauses of modern mortgages. The court should hold parties claiming or asserting rights under such instruments as these under consideration to strict proof of their claims, if the transaction as conducted in this instance is upheld at all. The petitioner has, in the opinion of the court, shown a superior right to the three engines numbered 36, 37, and 38, inclusive, included in Schedule A to Lease B, No. 2. In respect to the 1100 coal cars numbered 4200 to 5299, inclusive, embraced in said schedule, the evidence leaves the question of the superior right as between petitioner and complainant in great doubt. Many of said cars were received and paid for before said Lease B, No. 2, was executed. The great majority of them were in the possession and service of the railroad company prior to March 1, 1882. How or by whom they were paid for does not appear; nor out of what particular funds. They were all contracted for originally by the railroad company. The president of the road subsequently, on the 25th of November, 1881, before the car trust under Lease B, No. 2, was ever formed, assumed the right to transfer that contract to a so-called "Ohio Central Car-Trust Association," not then in existence, which he undertook to represent. It is doubtful whether a transaction so suspicious, and conducted by the company's president, who was then, or shortly thereafter, the holder of car-trust certificates of the road to the amount of \$50,000, should be sanctioned and sustained. It is not, however, deemed necessary to the determination of the present controversy to decide the question as to who has the superior right and title to the 1100 coal cars. No rental was due thereon by the company, under the terms of the contract, till March 1, 1885. The company, and the receiver appointed September 30, 1883, had the right to use said cars free of charge till default was made in the payment of the first instalment, maturing March 1, 1885. So far as the petitioner has established any right to or lien upon the equipment in controversy,

it clearly appears that he has already been paid therefor by the company, and the receiver more than he, or those he represents, were entitled to, and his claims for further payments, and for additional compensation for the use of said equipment by the receiver, are disallowed, and his exceptions to the report of the special master are overruled. Complainant's exceptions to the report are sustained. The petitions of McGourkey, trustee, will be dismissed at his costs. He will be further taxed with the costs of the reference to the special master. The fund in court will remain subject to the further order of the court, and complainant is left at liberty to take such steps as may be deemed proper to recover possession of the equipment in question.

Relative Priorities in the Foreclosure of Railway Mortgages.—See *St. Louis, etc., R. Co. v. Cleveland, etc., R. Co.*, 33 Am. & Eng. R. R. Cas. 16, note, 31.

BEEKMAN

v.

HUDSON RIVER W. S. R. Co. *et al.*

(*U. S. Circuit Court, S. D. New York, April 26, 1888.*)

Railway Mortgages—Foreclosure—Jurisdiction of U. S. Circuit Court.—The circuit court of the southern district of New York has jurisdiction of a suit to foreclose a railroad mortgage executed upon its right of way granted to it by congress, together with its improvements thereon, through the United States reservation at West Point in the state of New York.

Same—Pendency of Foreclosure in State Court—Effect on Suit in Federal Court.—The fact that a suit by trustees to foreclose a railroad mortgage is pending in the state courts will not bar a similar action by a second bond holder in the federal court.

Same—Suit by Trustees—When Bondholder may Bring Action.—Where the trustees of a railroad mortgage, given upon a written request of the holders of a majority in amount of outstanding bonds made in pursuance of a provision contained in the mortgage, file a bill to foreclose in the state courts, which is dismissed for want of jurisdiction, from which dismissal they appeal, and before the determination of the appeal they are urged by a bondholder to renew the litigation in the federal courts but refuse to do so, such bondholder may properly bring a suit, either himself or in his own name, to the extent of accrued and unpaid interest.

Same—Suit by Bondholder—Delay—Bar of Statute.—Where there is no pretence that a suit brought on the part of a bondholder to foreclose a railroad mortgage is barred by any statute of limitation, if delay for any less period than that prescribed by statute is sought to be availed of in bar of complainant's right to recover, the fact of such delay is a mixed question of law and fact which should not be passed upon on demurrer.

36 A. & E. R. R. Cas.—21

Same—Mortgage by Different Companies—Necessary Parties.—Where a bill to foreclose a railroad mortgage executed by two companies sets out the respective incorporations and grants of the original franchises to one of the companies, the practical consolidation of the two companies, the expenditure of large sums by the consolidated companies in the construction of a road, and the execution of a mortgage thereon, and traces the franchises through numerous mesne conveyances into the hands of a third company, by which it is leased to a fourth, such latter companies being respectively owners of the equity of redemption and lessee in possession, are properly made parties to the foreclosure.

Same—Incorporation of Company—Estoppel to Deny.—In an action to foreclose a mortgage executed by two companies to one of which the franchise was originally granted, and to which franchise a third company had succeeded through numerous mesne conveyances, and had leased to a third company for 975 years, it not appearing by the pleadings or the evidence that the validity of the incorporations of the original company had ever been questioned in direct proceedings brought for that purpose, and it being averred that such original company had acted continuously as a corporation, had acquired the mortgage premises, and executed the mortgage as such, received the proceeds of the bonds, and put them into the construction and operation of the road, the companies succeeding to the franchise are estopped from setting up that the original company had never been duly incorporated, and hence a demurrer by them on that ground should be dismissed.

Same—Defence by Transferee—Estoppel.—Where a railroad mortgage was executed jointly by the grantee of the original franchise and another company, covering the railways already constructed or thereafter to be constructed and the franchise owned by each, for the purpose of building and operating their respective lines, the bonds secured being those of the other company issued to enable it to acquire a lease from the original company of the road and entire property including the franchise, and to build and operate its road, etc., and the original company leased its franchise for the full corporate term of the other company, and transferred to it its entire capital stock, and thereafter the property and franchise passed through mesne conveyances into the hands of a third company who leased them to a fourth, the two last companies are estopped to dispute the validity of the mortgage, and hence a demurrer to a bill to foreclose such mortgage should be dismissed.

IN equity. On demurrer to bill for foreclosure of a railroad mortgage for a receiver and an account. This is a suit brought by the complainant, the holder of 15 bonds of \$1000 each, dated June 1, 1888, and made by the defendant, the West Shore Hudson River R. Co., payable 20 years after date with interest payable semi-annually on December 1 and June 1 of each year. The bonds, together with others of the same issue, are alleged to be secured by a trust deed or mortgage bearing even date made by the said obligor company and the Hudson River West Shore R. Co. to the defendants, Murdock and Duncan, as trustees of certain premises and franchises. The suit is brought to enforce complainant's rights and equities as holder of the bonds, and as *cestui que* trust under said trust deed or mortgage of the entire authorized issue, which was 2000 bonds, aggregating \$2,000,000, \$841,000 were actually issued. All of which bonds, except 144,

have been extinguished. The Hudson River West Shore Co. was organized September 15, 1867, for the purpose of constructing, etc., a railroad commenced at Pierpont and terminating at Newburgh, in the state of New York, between which points the company duly located and adopted its route, passing across property belonging to the United States at West Point. Under the act of congress approved December 14, 1867 (15 U. S. Stat. 33), the company was authorized by the United States to locate and operate its road on the line across the property belonging to the United States government at West Point, such location to be made under such regulations as should be approved by the secretary of war, who duly approved the location across the reservation and prescribed and approved certain regulations governing, and under which said road should be constructed and operated. The West Shore Hudson River R. Co. was organized October 26, 1867, and thereafter located and adopted its route pursuant to the provisions of its charter. Prior to the execution of the bonds and mortgage, an agreement was entered into between these companies that the Hudson River West Shore Co. should build and construct its road fast as possible, and as soon as the road should be built, it would lease its road and all lands whereon it was built, together with the rights, easements, etc., connected therewith for the full and unexpired term of its charter to the West Shore Co., it being also agreed that the latter company should be entitled to said lines as soon as it should have paid the moneys expended by the former company in the purchase of its right of way, location, etc., or should have assumed or become responsible for the same, and that all sums furnished by the said West Shore Co., or expended for the benefit of the Hudson River West Shore Co., and all bonds made by the former company, and deliver to the latter or applied or appropriated to its use and benefit, should be credited on account. The bonds were issued by the West Shore Co. to enable it to carry out the foregoing agreement to acquire said lease, and to complete and operate its road; the mortgage made by both of the companies referring to the agreement as to the issue of the bonds, and mortgaging the railways of the parties of the first part constructed or to be constructed within certain specified limits, and through property owned or thereafter to be acquired. Ten days after the execution of this mortgage the entire capital stock of the Hudson River Co. was transferred to the West Shore Co., and all the franchises, etc., of the former company transferred and leased to, and thereafter held and possessed by the latter company: the road having since been constructed and operated in compliance with the regulations of the secretary of war.

The New York, West Shore, and Chicago R. Co. was organ-

ized July 13, 1870, for the purpose of constructing a railroad along the west shore of the Hudson river, and in locating its route it adopted the lines of West Shore Hudson River R. Co., through the counties of Rockland and Orange; and on April 10, 1871, the former company mortgaged its property, including such as it might thereafter acquire from the Hudson River, West Shore, and the Hudson River West Shore Cos., the latter of which companies on July 21, 1871, transferred and set over to the New York, West Shore & Chicago Co. all its property, franchises, etc., including those of the Hudson River West Shore Co., and all its interest and property therein. The mortgage of the New York, West Shore & Chicago Co. was foreclosed May 4, 1878, and a deed given February 7, 1879.

The New York West Shore R. Co. was organized February 18, 1880, to construct and operate a road on the west shore of the Hudson river, and adopted in whole or in part the line of the West Hudson River R. Co., and of the Hudson River West Shore R. Co.; and on April 3, 1880, the North River R. Co. was organized, which also adopted the line and location of the two original routes. The purchasing committee, to whom the deed on foreclosure of the mortgage by the New York and Chicago R. Co. was given, transferred its purchase on August 5, 1880, to one Jordan, who, on August 27, 1880, transferred the same to the New York, West Shore & Buffalo Co., and on the same day the said company transferred all its property, franchises, etc., in the counties of Rockland and Orange, to the Northern River R. Co.

The Northern River R. Co. was organized May 5, 1881, being the consolidation of the Northern River R. Co. with another corporation. On May 12, 1881, the New York, West Shore & Buffalo Co. further ratified and confirmed the transfer of August 27, 1880, and on or about June 14, 1881, the Northern River R. Co. was consolidated with the New York, West Shore & Buffalo, under the name of the New York, West Shore & Buffalo R. Co., which last named company on August 5, 1881, executed a mortgage covering all its property, which was foreclosed in 1885, and a deed given to J. Pierpont Morgan and two others.

The West Shore R. Co. was organized December 5, 1885, its route coincided with the original line, and on the same day the said Morgan and his associates transferred to that company all the property, rights, etc., of the late New York, West Shore & Buffalo Co.; and on the same day the West Shore R. Co. leased the property to the New York Central & Hudson River R. Co. for the period of 975 years.

Ashbel Green and Howard Mansfield for the demurrer.

Frank F. Van Derveer (*Adrian H. Joline and William Allen Butler*, of counsel), *contra*.

LACOMBE, J.—1. The first ground of demurrer suggested is that this court has no jurisdiction of the subject-matter of the suit; that it is a suit *in rem*, to establish the lien of a mortgage, and foreclose the same; and that the mortgaged premises are wholly in territory not within the southern district of New York. By certain acts of the legislature of New York, the jurisdiction of that state in and over the land belonging to the United States at West Point was ceded to the federal government. Ownership of and jurisdiction over such territory are both in the United States, and therefore, as demurrants contend, "those lands are wholly excluded from the territory of the state." By section 541 of the Revised Statutes of the United States, the state of New York is divided into three districts, the northern and eastern of which are described as including certain counties of said state, with the waters thereof, while the southern district is defined as including "the residue of said state, with the waters thereof." Hence it is contended that the government reservation, being no longer a part of the state for any purpose, is not included within such residue, and therefore is not within the southern district of New York. The authorities cited in support of this proposition fall within one or other of two groups. To the first belong such decisions as that of the New York supreme court in *Murdock v. Railway Co.*, Orange special term, December, 1885, which was a suit brought by the trustees, who are defendants here, to foreclose this very mortgage. They hold that when the state has by express statute turned over to the federal government a portion of its territory, indicating in plain language its intention no longer to claim or exercise jurisdiction therein, the inhabitants of the ceded tract thereafter neither have political nor civil rights, nor are liable to the burdens of citizenship under the laws of the State. Inasmuch as the federal constitution, art 1, § 8, subd. 16, authorizes congress to exercise exclusive jurisdiction over such places, state statutes abandoning state jurisdiction therein are held to have accomplished their evident intent. State jurisdiction is thereafter at an end. To this group belong *Dibble v. Clapp*, 31 How. Pr. 420; *Com. v. Clary*, 8 Mass. 72, 1 Metc. 580; *Mitchell v. Tibbetts*, 17 Pick. 298. To the other group belong those cases in which it is held that when congress in organizing territorial governments, or establishing the limits of jurisdiction for some particular tribunal, has expressly excepted certain lands out of such jurisdiction or government, they constitute no part of such territory or district, although they are included within its geographical boundaries. Here again the federal statute is interpreted according to its plain intent. To this group of cases belong *U. S. v. Dawson*, 15 How. 467; *Langford v. Monteith*,

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of U. S. court.

102 U. S. 145; *Harkness v. Hyde*, 98 U. S. 476. The question raised by the demurrer in this case, however, is controlled by none of the decisions above cited. By section 2 of the act of September 24, 1789, "to establish the judicial courts of the United States" (chapter 20, 1 St. at Large, 73), the United States were divided "into thirteen districts, to be limited and called as follows: . . . One to consist of the state of New York, and to be called 'New York district,' etc." By this act the lands in question were undoubtedly included in the district named. What, if anything, has taken them out of it? The earliest state statute cited in the briefs of counsel ceding jurisdiction to lands at West Point is chapter 64 of 1826. Later acts are found as chapter 359 of 1875, and chapter 410 of 1876. It may be that there are earlier statutes bearing on the subject, but it is altogether improbable that any of them antedated the establishment of the military academy in 1802. These state statutes, however, are of course powerless to effect an amendment of a federal statute, under which congress has regulated the exercise of federal jurisdiction by federal courts. Such an amendment must be found, if at all, in the federal statutes themselves. In 1814 (chapter 49, 3 St. at Large, 120) the state of New York was, "for the more convenient transaction of business in the courts of the United States," divided into two districts, "in manner following, to wit: The counties of Rensselaer, Albany, Schenectady, Schoharie, and Delaware, together with all that part of the said state lying south of the said above-named counties, shall compose one district, to be called the 'Southern district of New York;' all the remaining part of said state shall compose another district, to be called the 'Northern district of New York.'" In 1818 (chapter 32, 3 St. at Large, 414) the counties of Albany, Rensselaer, Schenectady, Schoharie, and Delaware were transferred from the southern to the northern district. These statutes were passed before the first state act of cession above cited, and when, for all that appears in this case, the lands in question were politically, as well as geographically, a part of the state of New York. Even had the cession been made before their passage, however, it could not fairly be claimed that, by an act plainly providing solely for the division of a district already provided by law with the machinery by which federal jurisdiction was exercised in every part of it, some portion of the district so divided was deprived of the exercise of that machinery altogether. The intention of the legislature, when plainly deducible from the language used, will prevail over a mere verbal construction. *Wilkinson v. Leland*, 2 Pet. 627; *Brown v. Barry*, 3 Dall. 365; *U. S. v. Freeman*, 3 How. 562. It is manifest from an examination of these acts that congress, finding that the judicial machine they had provided in 1789 for

the New York district was insufficient to dispose of all the cases cognizable in existing federal courts, undertook to provide additional courts to dispose of them. That in so doing they intended to bar any part of the old district out of the jurisdiction of both the original and the supplemental courts is a conclusion unwarranted by anything in the statute. The same remarks apply to the act creating the eastern district (Act Feb. 25, 1865; chapter 54, 13 St. at Large, 438), and to the Revised Statutes, § 541, which, after defining the northern and eastern districts, describes the southern district as including "the residue of said state, with the waters thereon." No federal statute passed subsequent to the creation of the New York district, and accepting the cession of these lands, is cited by counsel. It appears that in 1790 (chapter 26, 1 St. at Large, 129) "the president was authorized to cause to be purchased for the use of the United States the whole or such part of that tract of land, situate in the state of New York, commonly called 'West Point,' as shall be by him judged requisite for the purpose of such fortifications and garrisons as may be necessary for the defence of the same." The executive has from time to time since purchased these lands, apparently solely under this authority. To find in this act, however, sanction for the proposition contended for by the demurrants, would be to hold that the very same congress (1st. Cong. 1789-1791) which created the New York district provided that the lands at West Point might at any time thereafter by mere executive action, whether congress were in session or not, be taken out of the district, and left a no-man's land, wholly unprovided either with state or federal courts. There is nothing in the phraseology of the act of 1790 to warrant such a construction. Neither is there anything in the opinion in *Re Manufacturing Co.*, 108 U. S. 401, 2 Sup. Ct. Rep. 894, in conflict with the views above expressed. In all the instances of a shifting boundary therein referred to, there was a federal statute ratifying or approving the change. The assent of congress was given to the contract between New York and New Jersey by the act of June 28, 1843 (chapter 126, 4 St. at Large, 708). The cession by Massachusetts to New York of the district of Boston Corner was consented to by the act of January 3, 1855 (chapter 20, 10 St. at Large, 602). The conventional boundary line between Massachusetts and Rhode Island was sanctioned by the act of February 9, 1859 (chapter 28, 11 St. at Large, 382). Each of these acts, when read in connection with the judiciary act of 1789, plainly imported that, when a state boundary was changed, lands theretofore assigned to one district were or were to be transferred to another. It was never pretended that any such change was effected by the mere operation of state statutes, and

in the case at bar there is cited no federal statute which will bear such construction.

2. The contention of the demurrants that the pendency of the action in the state court brought by the trustees to foreclose the same mortgage is a bar to this suit is conclusively answered by a reference to *Stanton v. Embrey*, 93 U. S. 548; *Insurance Co. v. Brune's Assignee*, 96 U. S. 588; *Weaver v. Field*, 16 Fed. Rep. 22.

3. The demurrants next challenge the bill upon the theory that the complainant has not a standing in court for the purposes of this suit. The mortgage contains a clause providing that in case of default for the space of four months in the payment of interest the principal shall become due, and that the trustees may, and "upon the written request of the holders of a majority in amount of . . . outstanding bonds, shall . . . within a reasonable time, being not less than four months, proceed to foreclose the mortgage," etc. Acting upon such request, the trustees, in December, 1884, commenced a suit in the supreme court of the state, which was dismissed at special trial term, December, 1885, for want of jurisdiction of the subject-matter. An appeal was taken by the trustees, and is apparently unprosecuted, and certainly undetermined. Complainant therefore requested said trustees to bring suit in this court, which they declined to do. The demurrants insist that complainant is not entitled to maintain this action unless it be shown that the trustees have refused to accede to a "written request of the holders of a majority of the bonds then outstanding." Whether or not, as urged by the complainant, the bringing of a suit in a court without jurisdiction of the subject-matter is a failure to comply with the written request, need not be now considered. There is no restriction in the deed of trust upon the right of the coupon holder, without assent of a majority of the bondholders, to foreclose for interest upon default, except when advantage is sought to be taken of that default as advancing the date when the principal becomes due. This suit may in any event be sustained for interest due (*Railroad Co. v. Fosdick*, 106 U. S. 47; s. c., 12 Am. & Eng. R. R. Cos. 367); whether it can be sustained for principal may be determined upon the trial.

4. The objection that the bill is not filed on behalf of all other bondholders similarly situated is wholly unwarranted by an inspection of its terms.

5. The next proposition advanced in defendants' brief, namely, that the demurring defendants' claims to the property covered by the mortgage are independent and adverse, may be true in fact, but it certainly does not appear on the face of the bill. To the Hudson River West Shore R. Co. alone was

the consent to build a railroad through the West Point reservation given by act of congress. The court will not take judicial notice upon argument of a demurrer that \$600,000 is not enough to build such railroad,—which is apparently what the demurrants counsel expects it to do. For all that appears, the road was substantially completed by the two original companies, and the complainant expressly avers that a large sum of money was expended by them in connection with the property which is averred to be covered by the mortgage. Across the West Point reservation there is now operated by the demurring defendants a railroad, which is so operated only by virtue of the act of congress above cited. The only title to this which it is averred the New York Central & Hudson River R. Co. has, is as lessee in possession of the defendant the West Shore R. Co. The only title which it is averred the last-named defendant holds has come to it through many hands indeed, but ultimately from conveyances made by the mortgagors subsequent to the mortgage. As owner of the equity, and as lessee in possession, the demurrants are proper parties defendant.

Claims of demurring defendants.

6. The demurrants next contend that complainant has slept so long upon his rights that by reason of lapse of time and his own laches he is not entitled to relief. There is no pretence that the suit is barred by any statute of limitations. If delay for any less period than that prescribed by the statute is sought to be availed of in bar of complainant's right to recover, the fact of such delay is a mixed question of law and fact, which should not be passed upon on demurrer.

Laches of complainant.

7. It is further contended that the bonds on which complainant sues are not valid obligations, for the reason that the "pretended West Shore Hudson River R. Co. never was a corporation." That corporation was organized under the general railroad act (1850) of New York, "for the purpose of constructing, maintaining and operating a railroad for the public use in the conveyance of persons and property from a point in the boundary line between the states of New Jersey and New York on or near the west bank of the Hudson river, extending northwardly to the village of Piermont, in Rockland county, N. Y., and intersecting with the Erie R. and the southern terminus of the Hudson River West Shore R.; also commencing at the northern terminus of the aforesaid Hudson River West Shore R., as the same had been, was, or might thereafter be, located at or near the city of Newburgh, Orange county, N. Y., and extending northerly along the west bank of the said Hudson river through the counties of Orange, Ulster, Columbia, and Greene, and terminating at Athens,

Defendants estopped to deny existence of corporation.

in said county of Greene, state of New York." The quotation is from the bill, and, it is contended, indicates an undertaking to build two railroads, whereas the statutes only authorize the incorporation of a company to build a railroad. As a matter of fact, the routes southerly to the state line and northerly to Athens touch the respective south and north *termini* of the route of the Hudson River West Shore R. Co. Whether that circumstance, taken in connection with the general power to lease and make traffic arrangements, conferred upon all railroad corporations by the act of 1839 (chapter 218), does or does not deprive the objection of force, need not be now considered. The validity of the incorporation has never been questioned in a direct proceeding by the state, nor by those interested in the corporation. It has acted continuously as a corporation; as such acquired the mortgaged premises, and created the mortgage debt; as such received the proceeds of these very bonds, and put them into the road covered by the mortgage. Objection to the validity of the corporation comes for the first time from these demurrants, the West Shore R. Co. and the New York Central & Hudson River R. Co. The only claim, however, which, so far as the bill discloses, these demurrants advance to the mortgaged premises,—to the concession granted by congress to the Hudson River West Shore R. Co.,—is based upon the transfer by the West Shore Hudson River R. Co. to the New York, West Shore & Chicago R. on July 21, 1871. It does not lie in the mouths of these demurrants to dispute the existence of the corporation whose acts constitute their own sole source of title. If they have some independent and adverse claim, it is nowhere disclosed in the bill. See 2 Mor. Priv. Corp. § 746 *et seq.*; Trust Co. *v.* Railway Co., 1 Railway & Corporation L. J. 50; Society Perun *v.* Cleveland, 43 Ohio St. 481; s. c., 12 Am. & Eng. Corp. Cas. 40; Palmer *v.* Lawrence, 3 Sandf. 161; Williamson *v.* Association, 89 Ind. 389; Railway Co. *v.* Railroad Co., 32 N. J. Eq. 755; Church *v.* Pickett, 19 N. Y. 482; Whitney *v.* Wyman, 101 U. S. 392; Hervey *v.* Railway Co., 28 Fed. Rep. 169.

8. Finally, it is urged that the mortgage created no lien upon the property of the Hudson River West Shore R. Co. The bonds to secure which the mortgage was executed were, as recited in the mortgage, bonds of the West Shore Hudson River R. Co., issued for the purpose of enabling the latter company to acquire a lease of the road and entire property and franchises of the former, and to build, furnish, and operate its own road. The demurrants contend that a railroad company has no power to mortgage its property to secure the debt of another company. Without discussing the precise question thus raised, it is sufficient to call

Lien of bonds
on Hudson
River West
Shore R. Co.

attention to the fact that the mortgage is a joint one executed by both roads, and covers "all and singular the railways of the parties of the first part hereto, constructed or hereafter to be constructed [between the state line and Newburgh], and also all and singular the franchises now owned, possessed, or acquired by the said parties of the first part, or either of them, for the purpose of building, maintaining, and operating their respective lines of railway," etc. Either prior or subsequent to the mortgage—the phraseology of the bill does not leave the date altogether certain—the Hudson River West Shore R. Co. leased its road for the entire term of its corporate existence to the West Shore Hudson River R. Co., and its entire capital stock was transferred to the latter company. The right of the West Shore Hudson River R. Co. to mortgage its own property to secure its own bonds is not disputed; and, even if the lease and transfer of stock were not made until after the mortgage, they would be covered by it as after-acquired property, unless such lease and transfer were void. That they were void these demurrants contend, but their own title depends upon the validity of these very transfers. The concession of congress was to the Hudson River West Shore R. Co. Nothing is shown qualifying the title of that corporation to this concession, except the mortgage, the lease, and the transfer. The two last instruments are operative, if at all, in favor of the West Shore Hudson River R. Co.; and nothing is shown qualifying the title of the latter company to the property thus sought to be transferred except this mortgage, and the transfer of July 27, 1871, to the New York, West Shore & Chicago R. Co., discussed under the last point, and under which the demurrants claim. They are, therefore, in no position to dispute the sufficiency of the lease and transfer of capital stock. There is no force in their argument that, if they "are to be considered as succeeding to the property and rights of the Hudson River West Shore R. Co., they can of course question the validity of the mortgage, if its validity could have been questioned by the corporation itself," because the very instruments which make them successors to the property and rights of the Hudson River West Shore R. Co. also operate to make the mortgage valid. If these rights were passed to the West Shore Hudson River R. Co., and thence to demurrants' grantor, they were covered by the mortgage, which was in existence, and operative to cover after-acquired property, before the West Shore Hudson River R. Co. passed them on.

The demurrer of the defendants the West Shore R. Co. and the New York Central & Hudson River R. Co. is overruled, with leave to answer.

Railway Mortgages—Foreclosure—Delay—Bar of Statute.—As to the effect of laches and delay, see, *ante*, *Foster v. Mansfield C. & L. M.R. Co.*,

281, and note, 297, 298; also *post*, Chicago, R. I. & P. R. Co. v. Wisconsin, I. & N. R. Co.

Estoppel to Deny Corporate Existence.—See *Oregonian R. Co. v. Oregon, R. & N. Co.*, 20 Am. & Eng. R. R. Cas. 523, note 537.

Parties to Suit for Foreclosure of Mortgage.—See *Dodge v. Omaha, etc., R. Co.*, 28 Am. & Eng. R. R. Cas. 260; *Gates v. Boston, etc., R. Co.*, 24 Ib. 143; *Wabash, etc., R. Co., v. Central Trust Co.*, 17 Ib. 254, note, 260; *Mittenberger v. Logansport R. Co.*, 12 Ib. 464, note, 487; *Forrest v. Luddington*, 12 Ib. 330, note, 344.

BARRY

v.

MISSOURI, K. AND T. R. CO.

(*U. S. Circuit Court, S. D. New York, May 12, 1888.*)

Railroad Mortgages—Exchange of Bonds—Excessive Interest—Charging to Income.—A railroad company which has paid a higher rate of interest than necessary upon prior incumbrances, cannot, in an accounting in favor of income bondholders, charge the difference against the income, when the mortgage securing the bonds contains express provisions against such application.

Same—Refusal to Surrender—Right to Income.—In an accounting under a railroad mortgage in which provision is made for retiring a series of second income bonds and issuing new bonds in exchange, which new bonds are to be held by a trust company until all are retired, a bondholder withholding his consent to surrender his bonds, is not entitled to claim as interest more of the income than his share would have been had there been no surrender of the bonds.

Same—Payment of Interest—Incomes Applicable to.—In ascertaining income applicable to the payment of interest, an allowance made by the mortgagor company to a connecting road for a division of earnings was under the peculiar facts and circumstances of the case rejected.

IN equity. The facts sufficiently appear in the opinion.

J. A. Davenport for complainant.

Winslow S. Pierce, Jr., for defendants.

WALLACE, J.—This cause is here upon exceptions filed by the railway company and the Mercantile Trust Co. to the master's report. By the interlocutory degree of April 26 1886, it was adjudged that the complainant and the other owners of income mortgage bonds created by the railway company were entitled to an account of the net earnings of the company for each six months from April 1, 1876, the date of the mortgage; and the railway company was accordingly directed to account before the master, in order to ascertain how much the complainant and others similarly situated should re-

Facts.

ceive from the company as owing for interest earned upon the bonds. The decree directed the master to charge the company with its gross earnings and income derived from all the property covered by the mortgage since the execution of the mortgage, and to credit the company with its operating expenses, its expenses for keeping the property in repair, and the sums paid, or which it was liable to pay, for interest upon prior incumbrances, and for taxes and assessments. Upon the accounting thus directed, the master found and reported that the net earnings of the company which should have been applied to the payment of interest upon the bonds, after rejecting the items which the company had sought without right to charge against income, amounted October 1, 1886, to \$3,547,012. By the exceptions filed the railway company complains that the master improperly disallowed two items charged against earnings in the income account,—one for interest upon prior incumbrances actually paid by the company, and the other for operating expenses in the form of an allowance to the international & Great Northern R. Co. for earnings diverted from that company.

Without repeating the opinion expressed at the hearing of the exceptions why the first item was properly disallowed by the master, it is sufficient for present purposes to state that, if the railway company has seen fit to pay a higher rate of interest upon prior incumbrances than it was liable to pay by its agreement with the owners of these incumbrances, it cannot charge the difference against the income, to the detriment of the income bondholders, in direct contravention of the agreement between the company and the income bondholders recited in the income mortgage.

Excessive Interest—Charging Income.

The second item was, in effect, disallowed by the master, although his ruling was in form only a refusal to permit the railway company to delay the accounting by the issuing of a commission to produce testimony to show the particulars and details of the item. The refusal was put upon the ground, by the master, that the item ought not to be allowed as a charge against net earnings under the terms of the mortgage, if all the particulars, and details sought to be proved were proved. It appears that June 1, 1881, five years after the execution of the income mortgage, the railway company leased the railway of the International & Great Northern R. Co. for the term of 99 years, and soon after acquired all the stock of that company, except 300 of the 10,000 shares, and since that time has operated the leased railway. After the interlocutory decree in this cause, compelling the railway company to render an account of its income, and apparently several months after the account before the master had commenced, Mr. Gould, who was then president of both railway

Item allowed for operating expenses—Allowance for earnings diverted.

companies, directed a credit to be made on the books of the Missouri, Kansas & Texas R. Co. in favor of the International & Great Northern R. Co., as follows: "Allowance to International & Great Northern R. Co. on adjustments of earnings diverted from their company's line to the Missouri, Kansas & Texas R., \$743,899;" and the same item was charged against income in the income account. This allowance seems to have been the result of a conference between Mr. Gould and the treasures of the Missouri, Kansas & Texas R. Co. According to the testimony of the treasurer, the allowance was made on his suggestion, and concurred in by Mr. Gould, upon the theory that the earnings of the International & Great Northern R. Co. were only equal to its fixed charges, and would have been more than its fixed charges had it been allowed to control its business in its own interest exclusive of connections with any other road; and the amount allowed was the difference between fixed charges and operating expenses, which had been advanced to it by the Missouri, Kansas & Texas R. Co. There was enough, probably, in the origin and history of this item, to justify the master in treating it as a mere matter of book-keeping, or as one manufactured for the purpose of the accounting, and destitute of any real foundation; but he placed his ruling upon the ground that by the terms of the income mortgage such a disbursement would not fall within the category of expenses incurred in operating and keeping in repair the 786 miles of road covered by the mortgage, and therefore was not a proper charge against income. In this he was clearly correct, and the ruling is fully approved.

The master excluded the Mercantile Trust Co., the holder of coupons and scrip certificates representing \$2,028,007 of unpaid interest, from proving its claim against the fund, and ruled that the fund should be distributed wholly to other holders of coupons and scrip. The correctness of this ruling is questioned by exceptions filed in behalf of that corporation, and also by the railway company. It appears that in November, 1883, the railway company resolved upon a plan for exchanging the income mortgage bonds for the bonds of a general consolidated mortgage created December 1, 1880. By the terms of the resolutions of the board of directors embodying this plan, it was provided that all income bonds offered for exchange should be deposited with the Mercantile Trust Co. as trustee, and held uncanceled as security for the new bonds until all the income bonds should be retired; and that the coupons and scrip certificates for unpaid interest upon the bonds offered for exchange should be retired at 60 per cent of their face value, flat, payable in the new bonds. At the time of the hearing before the master the greater part of the income bonds, with coupons attached representing \$1,307,205 unpaid in-

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Mercantile
Trust Co. from
proving claim.**

terest, had been exchanged with the company for the new bonds, pursuant to this plan, and were deposited with the Mercantile Trust Co., and held by it uncanceled; and scrip certificates to the amount of \$715,630 had also been exchanged for the new bonds, and were deposited with the Mercantile Trust Co., and by it uncanceled. The scrip certificates represent overdue interest coupons, which were detached from the bonds at the time of the exchange; and the coupons are those which were attached to the bonds at the time of the exchange, and have matured subsequently. The theory upon which the master ruled that these coupons and scrip certificates should not be allowed to share in the interest fund earned by the railway company was that they had been paid and satisfied by the railway company, the exchange being in legal effect a payment and satisfaction. According to his view, the holders of coupons and certificates who did not exchange them for new bonds are entitled to the whole interest fund until they have received their 6 per cent annual payments. It is quite immaterial whether the securities excluded from sharing in the interest fund are to be regarded as belonging to the Mercantile Trust Co., and treated as held in trust by that corporation for the benefit of the income bondholders who have consented to exchange their bonds for the new bonds, or whether they are regarded as really belonging to the railway company, and treated as held for its benefit by the trust company. The essential question is whether the railway company must pay over to the holders of outstanding coupons and certificates the whole interest fund, or enough of it to render them 6 per cent interest, with interest upon interest, by way of damages, or whether it must pay to them only such proportion as the amount of their respective coupons and certificates bears to all the interest payable by the terms of the income mortgage. It seems plain that the holders of income bonds, or of coupons or certificates representing unpaid interest on the bonds, who did not consent to surrender them in exchange for new bonds, are not entitled to any larger share of the interest fund than they would be if none of the original issue of bonds, or no coupons or scrip certificates, had ever been surrendered. It was competent for the railway company, in carrying out its scheme of refunding, to agree with the holders of income bonds, coupons, or certificates that, upon their exchange of their securities for new bonds, those surrendered should not be deemed paid, but should be kept alive to protect them against any enlarged claims of non-assenting holders; and, if such an agreement was made, the surrendered securities are to be regarded as held in trust by the trust company for the benefit of those who surrendered them. Ordinarily such an agreement, or some other arrangement for the protection of those who surrender secur-

ities, having a prior lien for securities secured by a junior mortgage, is one of the features of the refunding schemes of corporations. The rights of non-assenting bondholders cannot be prejudiced by any action on the part of the corporation and assenting bondholders in substituting new bonds for old; but it has sometimes been supposed that, if the refunding plan should assume the form of a payment of the old bonds, and an exchange of new bonds in satisfaction, the non-assenting holders of old bonds might acquire a priority which they did not have originally. Thus, in the case of *Ames v. Railroad Co.*, 2 Woods, 206, the railway company had executed a mortgage to secure a limited number of bonds, and afterwards executed another mortgage on the same property to secure a larger number of bonds, which recited that the holders of the bonds secured by the first mortgage had agreed to surrender the same, and receive in substitution therefor new bonds to be secured by the first mortgage, as modified by the second mortgage; and all the bonds secured by the first mortgage except 20 were exchanged for bonds secured by the second. Upon foreclosure the holders of the 20 bonds claimed that they were entitled to be paid out of the proceeds of the mortgaged property in preference to the holders of the new bonds, who had surrendered their old bonds in exchange, so that the proceeds which would have been divided among 2825 bonds, the number originally secured by the first mortgage, should be first appropriated to pay the 20 bonds which had not been surrendered. But the court held that, while those holders who had not surrendered their bonds were entitled to have their rights preserved unaffected by what had taken place, equity would be done by giving them such part of the proceeds of the sale as they would have been entitled to if the new bonds and mortgage had never been executed; in other words, that they were entitled to 20.2825 of the proceeds of the sale, and no more. In that case, however, the court placed some emphasis upon the circumstance that there was an express understanding between the corporation and those bondholders who consented to the exchange that the first mortgage should stand for the benefit of the new bonds. But suppose there is no express understanding between the corporation and assenting bondholders that the original security is to be kept alive for their protection, how are the rights of non-assenting bondholders enlarged by the surrender or payment of part of the bonds originally covered by the mortgage? No new contract is made with them by which their rights or their original liens are amplified. If it becomes necessary to enforce their mortgage, complete equity is done them if they are awarded the same share of the proceeds of the property which they would have received if no bonds had been surrendered. If, by the terms of the contract, the whole prop-

erty covered by a mortgage created to secure an issue of bonds is pledged to each bondholder, then, indeed, he may rightfully insist that he shall not be deprived of the fruits of his pledge by any subsequent dealings between the mortgagor and other bondholders to which he has not assented; and consequently he could reasonably claim that, if part of the debt to the payment of which the property was originally pledged has been extinguished, the proceeds of the property in case of a foreclosure must be applied to pay the balance before any other appropriation can be made of them. But such is not the contract implied between a bondholder and a mortgagor when the mortgage purports to secure a series of which his bond is one. The contract is that he shall receive the *pro rata* share of the whole security which his bond bears to the whole series. In *Claffin v. Railroad Co.*, 4 Hughes, 12, 8 Fed. Rep. 118, certain mortgage bonds had been acquired by the corporation in refunding operations, and the question arose whether the company, after having acquired them, could keep them alive, and reissue them, so that they would carry with them their original mortgage lien. Chief Justice Waite, in deciding the case, said:

"As against other bondholders secured by the same mortgage, I cannot believe there is a doubt of the power of the company to put out and keep out the entire issue up to the time the bonds became due. The contract with the individual bondholder was no more than that he shall have his due proportion of the security the mortgage on its face implies."

Where a mortgage is security for the whole number of a series of bonds, in a distribution of the proceeds of the sale of the mortgaged property each bond carries only a fractional interest in the proceeds of the property, to be ascertained by the proportion which its amount bears to the whole amount secured; and the holder of such a bond has no interest in the question whether holders of other bonds have the title or not. *Hodges' Appeal*, 84 Pa. St. 359. There is no principle in the law of corporations or of mortgages which forbids a corporation that has issued a series of mortgage bonds from purchasing part of them back, and reissuing them again before their maturity, when the financial interests of the corporation will be thereby promoted, unless the organic law of the corporation prohibits the exercise of such a power. If it is lawful for the corporation to do this, it is wholly immaterial whether it pays money upon such a purchase, or exchanges other bonds instead. And if it should destroy the bonds purchased, and issue duplicates, not intending to extinguish the debt evidenced by the bonds, the lien of the mortgage would not be affected by the substitution of the new bonds. *Watkins v. Hill*, 8 Pick. 522; *Pomroy v. Rice*, 16 Pick. 22; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65; *Dana v. Binney*,

7 Vt. 501. Of course, payment with intent to extinguish the debt would extinguish the lien.

In the present case the railway company intended that the income bonds exchanged for new bonds should remain with the trust company uncanceled until all the income bonds should be retired, and the resolutions embodying the refunding scheme distinctly provides for this; and although the language of the resolution, with reference to the coupons and scrip certificates representing the interest on the bonds, stated that they were to be "retired at sixty per cent of their face value" in new bonds, it cannot be doubted that the company did not intend them to be cancelled. They were not cancelled, but were deposited with the trustee, as were the bonds. It is conceded that the bonds were kept alive upon the exchange, and it is difficult to see how the slight difference of phraseology employed to describe the mode of retiring the coupons and scrip certificates can work any substantial difference in the effect of the transaction as to them. The coupons and certificates are nothing more than evidence of the promise contained in the bonds for the payment of interest. The lien of the income bondholders upon the income of the company for the payment of their interest cannot extend beyond the contract of hypothecation as evidenced by the bonds and the mortgage when read together. The lien of coupon or certificate holders is but the lien the bondholders have for interest. The income mortgage was created to secure a series of bonds for the sum of \$1000 each, amounting in the aggregate to \$10,000,000. Each bond contains a promise to pay the bearer from the net or surplus earnings of the railway company interest semi-annually at the rate of 6 per cent per annum; and recites that the whole series of bonds are secured by the mortgage, and that the income of the property covered by the mortgage is pledged to the payment of the interest thereon. Manifestly the contract between each bondholder and the railway company authorized the latter to issue 10,000 bonds. It is also manifest that the railway company only bound itself to pay interest to each bondholder to the extent of his proportion of its semi-annual income. Consequently the railway company would satisfy its obligation to each holder of a \$1000 bond by paying him one ten-thousandth part of its annual net income as interest on his bond. If this is a correct view of the contract between the company and the bondholder, it is obvious that neither the rights of the bondholder would be enlarged, nor the obligation of the railway company changed, by any increase or decrease in the amount of bonds issued. If the company had issued but 5000 of the 10,000 bonds, or if it had issued the whole number, and had then called in and purchased some of them, and then put them out again,

it would have made no difference in the rights of an individual bondholder. So, if the exchange of bonds is deemed equivalent to a payment of those surrendered, as well as of the coupons and certificates, the bondholders of outstanding bonds, coupons, or certificates occupy no different relation to the interest fund, and have no larger lien upon it, than before. The fallacy of the position of the complainant, and the other holders of coupons and scrip not surrendered, is in the notion that by the contract of hypothecation the whole income of the railway company, to the extent of 6 per cent annually, was pledged to the payment of the interest upon each bond. If this were true, and the claims of some of those who were originally entitled to share in the income fund had been extinguished by payment, the residue of the fund would inure to those whose claims remain unsatisfied. But the contract was that the company should distribute the income ratably among 10,000 bonds for \$1000 each, so as to pay each bondholder his share. This share constitutes the whole interest of the holders of outstanding coupons or certificates in the income fund.

The report is recommitted to the master to ascertain the rights of the parties to the fund in accordance with these views.

Railways—Income Mortgages—Misapplication of Earnings—Injunction.—In the case of *Barry v. Missouri, K. & T. R. Co.*, 36 Fed. Rep. 228, it was held that an injunction will be granted against a railroad company which has misapplied its earnings as against an income mortgage, and against which a decree has been entered allowing the income bondholders to apply for an injunction against further misapplication, although the charge in the application for the injunction is on information and belief, and for a cause other than the one formerly had in view, when the company relies on a bare denial of the charge of misapplication, gives no figures from which the condition of its business or the manner of disposing of its earnings can be ascertained, and makes no explanation of the shrinkage of its net earnings from nearly a million and a half dollars to zero.

In delivering the opinion of the court, Larcombe, J., said :

"The injunction asked for by complainant is phrased in the precise terms of the eighth clause of the decree of April 26, 1886. That clause reads as follows :

"Eighth. And it is further ordered, adjudged, and decreed, that the complainant be at liberty to make application to the court, that the Missouri, Kansas & Texas R. Co., its officers and agents, attorneys and servants, be enjoined and restrained from applying any of its earnings derived, or to be derived, from the railway and property described in the said mortgage, dated April 1, 1876, to any purpose other than to the payment of the operating expenses of the said railway, as described in the said mortgage, and to the payment of the expenses for keeping in repair its said railway and property, and to the payment of the interest on the several incumbrances which are prior to the said mortgage of April 1, 1876, and which are therein mentioned and described."

"It is true that the particular misappropriation of earnings to which the court's attention at that time was directed is not the same as that now charged. There is nothing in that circumstance, however, which should debar the complainant from making, as they do, *in ipsissimis verbis*, the

very motion which the decree contemplated. The allegations in complainant's affidavit as to misapplication of earnings are denied in the affidavit submitted by the defendant. That circumstance would, perhaps, ordinarily be sufficient ground for refusing the injunction, or for sending it to a master to find the facts; but in the case at bar other circumstances are entitled to consideration.

"1. Although complainant's charge of misapplication is made in part on information and belief, it could not well be otherwise; complainant not being an officer of the company, nor personally familiar with its transactions, nor having free access to its books.

"2. The defendant heretofore did misapply its earnings, and in a manner so plainly in violation of the trust created by the mortgage under which the income bondholders hold that this court characterized the theory under which the officers of the road acted as 'preposterous.' *Barry v. Railway Co.*, 27 Fed. Rep. 1.

"3. The last semi-annual period as to which there is definite information before this court touching the amount of earnings, is that ending October 1, 1886. The master has reported that the net surplus earnings of that period, even after paying \$619,175, the interest on the earlier mortgages, on which defendant is now defaulting, was \$830,288.38.

"4. The secretary of the company, who makes the denial relied on, confines himself to a mere bald contradiction of the charge in complainant's affidavit. With the books at his command and abundant information in his possession, he does not give the figures even of a single month from which the condition of the company's business, and the manner in which its earnings are disposed of, could be determined, and does not suggest a single fact to account for the shrinkage of net earnings from \$1,449,463.38 to zero.

"5. The injunction, if granted in the terms prayed for, would only require the road and its officers to refrain from doing what this court has after full argument decided that they have no right to do." See also *Dow v. Memphis, etc., R. Co.*, 33 Am. & Eng. R. R. Cas. 12, note, 15.

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FLINT AND P. M. R. CO. *et al.*

(U. S. Circuit Court, Michigan, March 22, 1888.)

Railway Companies' Mortgages—Reorganization Agreement—Appropriation of Income.—Where, upon the eve of foreclosure under a consolidated trust deed, a plan for purchase and reorganization was drafted by a committee of the consolidated bondholders, providing that the old stock should be deposited, and that the new company should issue first-mortgage bonds bearing 6 per cent interest, to be used only to fund the past-due and maturing interest on the prior bonds, and for permanent construction and improvement; the par value of outstanding consolidated bonds to be represented by preferred 7 per cent stock, and the outstanding common stock to be represented by common stock; holders of common stock not to be entitled to shares or to vote until preferred stock had been paid seven

successive annual dividends of 7 per cent; and the property was paid in and a reincorporation effected on this basis, the new charter providing that the funds applicable to the payment of dividends on preferred stock was the net income after paying interest on prior bonds, expenses and equipments, etc., any surplus after paying 7 per cent to stand over until next dividend day; and at the first meeting of the new board a resolution was passed to the effect that under operating expenses only such improvements and additions should be included as was necessary to keep the property efficient, and that all beyond this should be provided for out of funds other than net earnings,—the directors were bound by the provisions of the agreement and by their charter as interpreted by the resolution and the common stock, and the common stockholder was entitled to representation upon its being made to appear that the earnings and income which had been wrongfully converted to pay for improvements and extensions would, if applied to dividends, be sufficient to pay five successive dividends of 7 per cent each on the preferred stock.

Same—Common Stockholders—Rights of.—Where, pursuant to an agreement for purchase and reorganization of a railroad company which was about to be foreclosed under a consolidated deed of trust, the company conveys to the trustees of the separate mortgage of its land grant all its equities in trust to pay all liens on the lands and to turn in the balance to the trustees, and upon the sale of the property under such last trust, and its being paid in by the purchasing committee, these equities passed with it, and the trustees paid all except one of the liens for \$300,000, partly secured on other property, for which charge for a period of five years they had on hand fourfold security,—it was held that as between preferred and common stock, the latter of which was under the charter to be debarred from participating until the former had been paid successive dividends of 7 per cent during those five years, the surplus after providing for the security of the \$300,000 lien, as well as the premiums received by the company on first mortgage bonds issued and sold by it, was to be applied to dividends.

Same—Operating Expenses—What not to be Charged as.—In such case a steel-rail betterment as well as money spent on steamers owned by the company to make them more efficient, and money borrowed and expended in the purchase of new freight engines and coal cars, should not be charged to operating expenses; and in the event of no depreciation account being kept, the expense account should not be charged with an estimated depreciation, where the money so charged was not actually spent upon repairs.

Same—Injunction—Right of Holders of Common Stock to.—Injunction will lie at the instance of holders of common stock of railroad companies who are entitled to, but are deprived of, the right of representation pending suit for the enforcement of such right, to restrain an illegal, disadvantageous, and *ultra vires* purchase by the company of another road.

Same—Purchasing Franchise of another Road—Michigan Statute.—There is no statutory provision in Michigan authorizing one railway company to acquire the stock and franchise of another completed company with the intention of itself exercising such franchise.

Same—Suit to Compel Organization—Pleading—Supplemental Bill.—Where a suit has been brought by holders of common stock of a railroad company to compel organization by the directors, and thereafter another bill to the same effect is filed by substantially the same parties, alleging, in addition that the defendant company was about to buy another road, and praying that the contemplated purchase be enjoined as being *ultra vires*, to which bill the road about to be purchased is improperly made a party, if the right to the relief demanded in the original bill is established, the second bill is more properly considered as a supplemental bill, and although filed

without leave of the court, as required by rule 54, should be allowed to stand as to the original defendants.

IN Equity. On final hearing. The opinion states the facts. *J. Lewis Stackpole, Alfred Russell, and Henry S. Dewey* for complainants.

William L. Webber and Henry M. Campbell for respondents.

JACKSON, J.—The above-entitled causes were heard together. The first is filed by complainants on behalf of themselves and other holders of provisional certificates, as hereinafter explained, to compel the Flint & Pere Marquette Railroad Co. and its directory to recognize them in full as stockholders in said company, and to issue to them regular certificates of stock therein, such as will give them the rights of actual stockholders in said corporation, entitle them to vote and exercise a voice in the management of its affairs, from which they claim to be at present unjustly and improperly excluded. The second bill is filed by substantially the same parties, asserting the same right, and seeking to enjoin and restrain the Flint & Pere Marquette Railroad Co., in which they claim the right to be admitted as actual stockholders, from purchasing or leasing the Port Huron & Northwestern Railway Co., on the grounds that such leasing or purchase would be injurious to their interests, and unwarranted by law. The questions presented by this second bill, or rather, raised by the motion for preliminary injunction thereunder, depend to a greater or less extent upon the conclusion which the court may reach as to whether complainants, and those standing with them in the same position with them, are entitled to be treated and regarded as present stockholders in the Flint & Pere Marquette Railroad Co. It will, therefore, be most proper first to consider the matter involved in the first of the above suits, and to determine the relations which complainants bear to, and the rights which they may justly assert in, the Flint & Pere Marquette Railroad Co.

The material facts of this case, as disclosed by the bill, answer, exhibits, and proofs, are these: The Flint & Pere Marquette Railway Co., a corporation existing under the general railroad laws of Michigan, in 1872, executed to W. W. Crapo,

Facts. Andrew G. Pierce, and Publius V. Rogers, as trustees its consolidated trust deed or mortgage upon its franchises and property of every description (except certain land grants derived from the United States through the state of Michigan, which had been previously conveyed in special parcels, and by separate trusts to secure certain bonds of the company), for the purpose of securing the payment of an issue of bonds, as provided for therein, to the amount of \$6,657,000, to be known and designated

as "Consolidated Bonds" of said railway company. Between four and five millions of these consolidated bonds were actually issued, on which the company made default in the payment of the interest thereon; and in June, 1879, said trustees filed their bill in the United States circuit court for the Eastern district of Michigan, at Detroit, for the foreclosure of said consolidated trust deed and mortgage by a sale of the property and franchises covered thereby. Shortly before the commencement of this suit, Jesse Hoyt, as president, and H. C. Potter, as secretary, of said railway company, issued a circular to the stockholders and others interested, notifying them that foreclosure proceedings were about to be instituted, explaining the situation of the company affairs, and informing them "that a plan for purchase and reorganization will be prepared by a committee of the consolidated bondholders at an early day." Such committee, composed of H. A. V. Post, as chairman, Francis Hathaway, A. G. Brower, H. H. Fish, and Loum Snow, Jr., was appointed by the bondholders about the time of, or soon after, the institution of the foreclosure proceedings. This committee issued the reorganization scheme made Exhibit A to the bill of complainants, which, so far as need be noticed, was as follows:

"(3) The new company to issue reorganized first mortgage six per cent bonds, having thirty years to run, and redeemable, at the pleasure of the new company, at par and accrued interest. This mortgage to be used only to fund the past-due and maturing interest on the prior bonds, and for such permanent construction and improvement as may be deemed desirable by the board of directors of the new company. (4) Preferred seven per cent stock shall be issued, sufficient in amount to represent the par value of the outstanding consolidated bonds and the past-due coupons to May 1, 1879, inclusive. This preferred stock shall always be entitled to one vote for each and every share. Payment of dividends of seven per cent, or any part thereof, on this preferred stock, will be contingent on the net earnings of the company, and without accumulation. (5) Common stock shall be issued, sufficient in amount to represent the outstanding common stock of the old Flint & Pere Marquette Railroad Co., and this stock shall not be entitled to vote until the new company shall have earned and paid, for five successive years, seven per cent annual dividends on the preferred stock. (6) The preferred and common stock of the new company will be issued to the purchasing committee, who will deliver, or cause to be delivered to the representatives, for the time being, of the holders of the eight per cent consolidated bonds, and of the holders of the common stock of the old company, who may join in this scheme of reorganization, the amount *pro rata* to which they are entitled, as near as may be, and the purchasing committee will dis-

pose of fractions for the benefit of the parties entitled thereto, in such manner as they may deem most expedient and equitable. (7) The benefit of these proceedings shall accrue only to those who shall deposit their securities and common stock with this committee within the time limited by them; it being understood that they may extend the same from time to time, as seems to them proper for the interests of all concerned. (8) The purchasing committee will issue certificates and stock that they may be entitled to." "(12) The general principles in this scheme, and the order of priority, and the respective amounts of these organization securities and stocks, being substantially maintained, the purchasing committee may change this scheme to meet any exigencies that may arise."

The defendants in their answer deny that this was the scheme actually adopted by the committee, and insist that the bondholders in fact agreed upon another and different plan, which did not contain any recognition, or make any provision for the common stockholders of the railway company. While there is some conflict in the testimony on this point, the decided weight of the evidence establishes to the satisfaction of the court that the reorganization scheme, as set out above in Exhibit A, was the one which the committee adopted, recognized, and acted upon. It was under this scheme that the consolidated bonds and stock certificates of the Flint & Pere Marquette Co. were delivered by the holders thereof to the depositaries designated by the committee, and authorized to receive and receipt for the same. While the committee were engaged in getting the stock and consolidated bonds deposited under this reorganization scheme, and pending the foreclosure proceedings in the circuit court, the Flint & Pere Marquette Railway Co., the only defendant therein, by a conveyance, bearing date August 23, 1879, surrendered to W. W. Crapo and Oliver Prescott, trustees under the several land-grant mortgages, its equity of redemption, and all its right, title, and interest in the surplus lands and land funds then held or thereafter received by said trustees, after satisfying and discharging prior trusts, as an additional security for the payment of said consolidated bonds. This conveyance contained a general declaration of trust, and provided that, after satisfying the prior land-grant mortgages, the balance of said lands and the surplus of funds thence arising and held by said trustees, Crapo and Prescott, should be accounted for, and be by them transferred to the trustees of said consolidated mortgage or trust deed, so that such surplus funds and lands would inure to the benefit of said consolidated bonds, and become a part of the security for their payment. This conveyance and declaration of trust by the Flint & Pere Marquette Railway Co., made with the consent of the stockholders of said company, as the court must assume or presume,

brought within the operation of the consolidated mortgage, then being enforced, the surplus lands and land funds held by Prescott and Crapo as trustees, after discharging prior liens, and gave the consolidated bondholders the benefit of an additional security worth several millions of dollars. Whether the general scheme of reorganization adopted by the committee formed the consideration or inducement for this large and valuable addition to the security of the consolidated bonds does not distinctly appear, but it is a fair and reasonable inference that the stockholders of the railway company then in default, and then being proceeded against, would not have consented to place their surplus land and land funds under the operation of the consolidated mortgage, at that time, without some well-founded expectation of being admitted into the new company that might be organized upon the ruins of the old. After the execution of this trust conveyance of August 23, 1879, a supplemental bill was filed immediately in said foreclosure proceeding by the trustees under both the consolidated and the land-grant mortgages, for the purpose of bringing this additional security under the decree of sale. Such proceedings were thereafter had under the original and supplemental bills as resulted, June 12, 1880, in a decree of the court, finding that the defendant corporation was in default; that the outstanding and unpaid consolidated bonds and interest coupons thereon, up to and including May 1, 1880, amounted to \$6,236,368.80; that the trustees were entitled to have the property sold, as specified in the consolidated mortgage and in the trust conveyance of August 23, 1879; but directed that such sale should be made subject to certain prior claims mentioned in the pleadings, and particularly enumerated as follows:

"(1) Such lawful claims as may be made under the trust deed dated April 6, 1862, and the bonds secured thereby, and referred to in the bill as the first (land) trust; (2) such lawful claims as may be made under the trust deed of September 25, 1866, and the bonds secured thereby, referred to in the bill as the second (land) trust; (3) such lawful claims as may be made under the trust deed dated September 4, 1868, and the bonds secured thereby, referred to in the bill as the third (land) trust deed; (4) such lawful claims as may be made under the trust deed and the bonds secured thereby on the Bay City Branch, amounting in the whole for principal, besides interest, to \$175,000; (5) such lawful claims as may be made under the trust deed and mortgage dated September 4, 1868, and the bonds secured thereby, referred to in the pleadings as the Flint & Holly bonds; (6) such lawful claims as may be made under the trust deed and mortgage, dated January 2, 1871, and the bonds secured thereby, referred to in the pleadings as the Holly, Wayne & Monroe bonds; (7) such claims as may be outstanding

and unpaid against the receiver heretofore authorized, and such as may be hereafter authorized by this court."

The line of railway, as described in the bill, with all its property, rights, franchises, including things in action and equitable rights, together with the trusts as to the surplus lands and land funds, conveyed by the trust deed of August 23, 1879, were sold August 18, 1880, by a special master commissioner, duly appointed by the court, after advertising the sale as directed by the decree; and said Post, Fish, Snow, Brower, and Hathaway, as the purchasing committee under the aforesaid scheme of reorganization, became the purchasers at the price of \$1,000,000, which, under the terms of the decree, was paid chiefly with consolidated bonds as cash. The sale was reported to the court, and the purchasing committee thereupon presented their petition to the court, setting forth that their said purchase was made pursuant to a scheme of reorganization before then agreed upon; that said purchasers and their associates had reorganized a corporation by the name of the "Flint & Pere Marquette Railroad Co." to take charge of, manage, and operate the railroad property so purchased under the decree, etc.; and praying that the special master commissioner might be ordered and directed to make a deed upon said sale direct to said newly organized corporation. This order, after confirming the commissioner's report of sale, was passed by the court, and the special master commissioner, by deed bearing date September 28, 1880, formally conveyed and transferred to the new corporation, the Flint & Pere Marquette Railroad Co., all the property, rights, franchises, trusts, etc., so sold, as aforesaid. After the sale by the master commissioner, the purchasing committee, to whom the franchises, privileges, equitable rights and trusts were struck off, together with their associates, under date August 31, 1880, filed with the secretary of state at Lansing, Mich., a "certificate of reorganization and articles of association of the Flint & Pere Marquette Railroad Co., successor to the Flint & Pere Marquette Railroad Co." These articles of association, which constitute the charter, or organic law, of the new corporation, after reciting the foregoing steps and proceedings, leading up to its formation, certify and declare, among other things not material to be noticed, as follows:

" Clause 2. The purpose for which said corporation is organized is to use, maintain, and enjoy, manage, and operate the said railroad and other property and franchises as aforesaid, including the right of using and enjoying the railroad, built, as aforesaid, and in use; and also for the purpose of extending such spurs and branches from time to time, as may be found useful and necessary for the purpose of developing and increasing the traffic of said road, and as may be authorized by law.

"Clause 3. The present property of the corporation here by organized consists of all the property of every kind and description, including franchises and rights sold and purchased under said decree, as aforesaid.

"Clause 4. The capital stock of the corporation hereby organized shall be the sum of ten million dollars, in shares of one hundred dollars each, divided into two classes, to wit: First, preferred stock, which shall consist of the sum of six million and five hundred thousand dollars, divided into sixty-five thousand shares, each share being the sum of one hundred dollars; second, common stock, consisting of three million five hundred thousand dollars, divided into thirty-five thousand shares of one hundred dollars each. And it is agreed that the rights of the holders of said preferred stock and said common stock shall be as hereinafter stated, to wit: The holders of said preferred stock shall be entitled to receive from the earnings of said railroad company hereby organized, dividends to the amount of seven per cent per annum, payable semi-annually or annually, as may be directed by the board of directors; provided the net income, after paying interest on prior bonds, repairs, expenses of equipment and renewals, shall be sufficient for that purpose, or such portions thereof as the said net income shall amount to. In case there shall be any surplus of net income after the payment of said dividend of seven per cent upon the preferred stock, the same shall stand undivided until the next dividend day, and so from time to time and from year to year, until such time as the holders of said preferred stock shall receive five consecutive annual dividends of seven per cent, or semi-annual or quarterly dividends equivalent thereto. In case, on any dividend day, the net income as aforesaid shall not be sufficient to pay seven per cent annual dividend to the holders of said preferred stock, such holders of preferred stock shall have no right to have the dividends made up out of subsequent earnings; it being the intention that there shall be no accumulation of claims against the company for dividends for such preferred stock. We further certify and declare that the said common stock shall not be issued, nor any portion thereof, until after the preferred stock shall have received five consecutive annual dividends of seven per cent from the net income, as aforesaid, or other dividends equivalent thereto; nor shall said common stock be entitled to any representation at any meeting of stockholders until the same shall have been issued. When five consecutive annual dividends of seven per cent, or, in lieu thereof, semi-annual or quarterly dividends equivalent thereto, shall have been paid upon the preferred stock, then the common stock shall be issued and delivered to parties who may hold certificates issued upon the surrender of the common stock of the old Flint & Pere Marquette

Railway Co., or other certificates which may be issued by this company in lieu thereof ; and, if there shall be any surplus of common stock it shall be the property of the company hereby organized. After the common stock shall have been issued, as above provided, the preferred stockholders shall be entitled to receive from net earnings seven per cent dividends each year before the common stock shall be entitled to participate ; and after the payment of the seven per cent to the holders of the preferred stock, any surplus of net earnings that may remain shall be paid as dividends, ratably, to the holders of the common stock, not exceeding seven per cent in any one year. Should the net income be greater than sufficient to pay a dividend of seven per cent upon the whole amount of stock, both preferred and common, such surplus shall be divided ratably among the holders of the preferred and common stock. Should the net income of the company, after the common stock shall have been issued, be insufficient to pay the dividends hereinbefore provided for in any single year, such deficiency shall not be made up out of the earnings of the subsequent year or years, and this shall apply both to preferred and common stock"

By the sixth article it is expressly declared that "the undersigned purchased said property at the sale under said decree in trust for themselves and others interested, pursuant to a scheme of reorganization heretofore agreed upon."

At the first meeting of the board of directors of the new corporation, held September 7, 1880, a resolution was adopted authorizing and directing the president and secretary to issue engraved or lithographed certificates, to be given to the committee of reorganization or their assigns, representing the beneficiary interest to be derived from the issue of common stock, when it may be issued, in accordance with the form then presented, which form was as follows :

" Certificate for Common Stock, when the same shall be issued.

" STATE OF MICHIGAN.

" *The Flint & Pere Marquette Railroad Company.*

" INCORPORATED AUGUST 31, 1880.

" This certificate will entitle ——— to ——— shares of the common stock of the Flint & Pere Marquette Railroad Co., when such stock shall be issued. Said common stock consists of 35,000 shares of \$100 each, but will have no vote nor voice in the management until issued in accordance with the plan of organization, viz., when the preferred stock shall have received five consecutive annual dividends of seven per cent, or semi-annual or quarterly dividends equivalent thereto. This certificate is negotiable, and may be transferred on the books of the company in the

city of New York on the surrender hereof. By order of the board of directors.

WM. W. CRAPO, President.

"Dated East Saginaw, ———, 1886.

"H. C. POTTER, JR., Secretary.

"A. S. APGAR, Transfer Agent."

While the capital stock of the foreclosed company consisted of 35,000 shares of \$100 each, making \$3,500,000, only 3,298,200, or 32,982 shares of stock, had been actually issued. Of this actual issue there were deposited with the various depositaries designated by the reorganization committee, for the purpose of sharing in the reorganization scheme, and in pursuance of notice from the committee, stock certificates to the amount of \$3,266,500, for which receipts were given by the several depositaries receiving the same, and for which the certificates in the form above stated, as directed by the board at its first meeting, September 7, 1880, were given in exchange. It appears from the testimony of Dr. H. C. Potter, whose relations to, and long connection with, the foreclosed company placed him in a position to know the fact, that when the foreclosure proceedings were commenced, and while the reorganization scheme was being arranged, the holders, or those interested in the old stock, were the same parties, or very largely so, who controlled the consolidated bonds that were in default, and prior bonds. This is an important fact, and should not be lost sight of in considering the questions involved in this case. It will be noticed that by the fifth and sixth clauses of the reorganization scheme both the preferred and common stock, or certificates therefor, were to be issued in favor of those who should join in the plan adopted, immediately upon the formation of the new company, although the common stock was not entitled to vote until the preferred stockholders had been paid seven per cent annual dividends, for five successive years. This provision for the issuance of the common stock is changed by the fourth clause of the articles of reorganization, which declares "that said common stock shall not be issued, nor any portion thereof, until after the preferred stock shall have received five consecutive annual dividends of seven per cent from the net income, as aforesaid, or other dividends equivalent thereto." In explanation of this departure from or change in the reorganization scheme previously adopted, it is said that the committee's attorney advised them that under the laws of Michigan it would not be legal to actually issue common stock, and deprive it of the immediate right to vote. The provisional certificate issued to the old stockholders, as above set out, follows the provision of article 4 of the new company; and the complainants, being the holders of such certificates, acquired since the reorganization or forma-

tion of the new company, can only assert the rights which are conferred upon them by and under the fourth article of the reorganized company, and the contract expressed on the face of their certificates. Having acquired or accepted the present form of certificates, the complainants are fairly estopped from asserting claim for the issuance of the common stock, as contemplated by the scheme of reorganization. They are not in a position, nor do they make a case entitling them to have the articles of association, or charter of the new corporation so reformed as to conform to the reorganization scheme in respect to the issuance of common stock certificates.

**Complainants
estopped by
accepting cer-
tificates.**

On the part of the complainants it is claimed that the preferred stock, as provided for in the articles of association forming the new company, was unauthorized by the laws of Michigan; and on the part of defendants it is insisted that the provision in reference to the issuance of common or unpreferred stock was invalid, because founded upon no consideration moving from the old stockholders, or to the new company, and because that provision was in contravention both of the letter and spirit of the Michigan statute against stock watering (act of 1859, 1 How. St. § 3409;) and that the new corporation may rightfully refuse to recognize or issue said common stock. Neither of these positions, which were practically waived or abandoned on both sides at the hearing, can be successfully maintained. The act of Feb. 10, 1859 (1 How. St. § 3409,) clearly authorizes the issuance of preferred stock in cases like the present. It is equally clear that the stock watering provision of the statute (Id.) has no application. There was no fraudulent or unfair valuation of the prop-

**Validity of re-
organization—
Preferred and
common stock.**

" 'Sec. 3409. That it shall not be lawful for any railroad company existing by virtue of any of the laws of this state, nor for any officer of any such company, to sell, dispose of, or pledge any shares in the capital stock of such company, nor to issue certificates of shares in the capital stock of such company, until the shares so sold, disposed of, or pledged, and the shares for which such certificates are to be issued, shall have been fully paid; nor issue any stock or bonds except for money, labor, or property actually received, and applied to the purpose for which such corporation was created; and all fictitious stock dividends and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void; and, if any officer or officers of any such company shall issue, sell, pledge, or dispose of any shares or certificates of shares of the capital stock of such company, in violation of the provisions of this act, such officer or officers so doing shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided by law in case of issuing false or fraudulent railroad stocks. The provisions of this act shall apply as fully to the stocks and officers of consolidated railroad companies, as existing in whole or in part within the state, as to original unconsolidated companies existing as aforesaid."

erty, franchises, privileges, or rights and trusts, which the promoters, consisting of lien claimants and stockholders of the old company, turned over to the new corporation, under the scheme of reorganization. Certainly there was nothing that could be called stock watering, within either the letter or the spirit of the Michigan statute. The case of *Railroad v. Dow*, 120 U. S. 287, is a conclusive authority in favor of the legality and validity of the reorganization in the present instance. The provision of the Arkansas constitution there under consideration was substantially the same as the Michigan statute; and a reorganization of a railroad company by purchasers at foreclosure sale, under circumstances undistinguishable in principle from the present, was sustained by the supreme court as not coming within the constitutional prohibition.

The objection of a want of consideration for the provision in reference to the common stock, cannot, for many reasons, avail the defendants; because there was ample consideration in the mutual agreements of the consolidated bondholders and the stockholders, under which the latter surrendered their certificates, and not only assented to the foreclosure, but, by the conveyance of August 23, 1879, provided an additional and valuable security in the shape of the surplus lands and land-grant funds held by Crapo and Prescott, trustees. The courts have not hesitated to recognize and give effect to such compromise arrangements between bondholders and stockholders in respect to corporations being foreclosed. In *Sage v. Railroad Co.*, 99 U. S. 343, Mr. Justice Strong, speaking for the court, says:

Objection of
want of con-
sideration as
to common
stock.

"Let it be conceded that the new organization must be for the benefit of the holders of the first mortgage bonds, how can we say it is not for the benefit of those holders that entirely subordinate interests are conceded to junior lien creditors, and to the stockholders of the former corporation? How can we say that such a concession was beyond the discretion with which the agents of the bondholders—that is to say, the majority—were clothed? Such concessions are generally made in reorganizations of railroad companies, and they are regarded as beneficial to the joint lien-holders. They prevent delay and expenditures arising out of litigation between creditors, which are sometimes almost ruinous, and they lessen the risk of redemptions."

"It is sometimes so far within the power of stockholders and unsecured creditors to embarrass and delay proceedings for the foreclosure of the mortgage and sale of the property that it is expedient for the mortgage creditors to arrange for a reorganization, and give up something of their own security for the sake of avoiding litigation and delay." *Jones, Ry. Sec.* § 614.

But, aside from the foregoing considerations, which sufficiently dispose of the objection of a want of consideration for the provisional certificates or unpreferred stock, it should be borne in mind that the common stock in the old company was held largely by the consolidated bondholders, who, while accepting preferred stock for their bonds, naturally enough assented to the provision for the common stock. After the formation of the new company, its directors, selected alone by and from the preferred stockholders, issued the provisional certificates for common stock, which are not only recognized by the corporation, but become the subject of sale and transfer in the market; and now, after the original holders of these certificates, consisting to a considerable extent of the present directory, have disposed of their holdings, and when the present holders thereof seek to have their rights thereunder recognized and enforced, they are met with the objection, interposed by the same directory who issued these certificates, and by the corporation, whose charter recognized their existence, and provided for the issuance of the common stock represented thereby upon the happening of a certain contingency that this common stock has no validity for want of consideration moving to the new corporation. How can this new company dispute or call in question its own constitution, and the provision therein made for the issuance of common stock in a certain event? How can preferred stockholders, or their representatives, the directors of the corporation, dispute the validity of the very clause of the organic act, which confers and establishes their own rights? Such a proposition rests upon no principle, and is supported by no authority. It is founded upon the idea that because the bondholders, by virtue of their lien, had superior rights over the stockholders of the old company, and could have exhausted its property to the utter exclusion of the stockholders, therefore, when they became preferred stockholders in the new company, they in some way carried with them the superior equities belonging to their former relation to the old concern. This is, however, a mistake and a fallacy. Their right as bondholders ceased when their character of preferred stockholders began. Their lien as bondholders, as well as their character of bondholders, was extinguished by the foreclosure sale, and the reorganization thereafter had in pursuance of the scheme previously adopted with their consent. In forming the constitution of the new corporation, all prior equities existing under the old company were settled and extinguished; new relations were established and new rights created. Neither the new corporation, nor the preferred stockholders, nor the common stockholders, who have accepted, acted upon, and acquired rights and privileges under the reorganized company, can be

Company cannot dispute rights of common stockholders.

heard, in contests among themselves, to question the organic law declaring and defining the beneficiaries of the legal being thus created. Stockholders, preferred and unpreferred, are only entitled to such rights as the constitution of the new corporation, found in its articles of association, properly confer. These rights the company cannot question; nor can it properly take sides in contests between the two sets of stockholders in respect to their relative rights, as defined by the act or articles of incorporation.

We come next to the main controversy in this case, which relates to the right of complainants, as holders of the provisional certificates for unpreferred shares, to have regular certificates of stock issued to them by the Flint & Pere Marquette Railroad Co. This right is claimed on the ground that the event or contingency on which the provisional certificate holders were to become actual stockholders of the common class has, in the view of a court of equity, happened. It is not claimed in the bill that the preferred stockholders have, in fact, received 7 per cent annual dividends for five successive years. It is alleged that the dividends actually paid on the preferred stock were $5\frac{1}{2}$ per cent in 1881, $6\frac{1}{2}$ per cent in 1882, 7 per cent in 1883, 7 per cent in 1884, and 4 per cent in 1885; but it is charged the failure of the directors to declare and pay the full 7 per cent dividends each year for each of said years was due to their neglect of duty, and intentional disregard of complainants' rights; that the net income of the company applicable to the payment of preference dividends, as defined by article 4 of the certificate of incorporation, was misappropriated, and diverted from its legitimate purpose, as contemplated and provided by said article, and applied to other uses in the interest and to the advantage of the preferred stockholders; "that the real and actual net income of these several years, if the affairs of said railroad company had been properly conducted and the accounts thereof kept with a legal and proper consideration of the rights of your orators, as hereinbefore set forth, together with the surpluses remaining on hand in each several preceding year, was, after paying interest on prior bonds, repairs, expenses of equipment and renewals, sufficient for the payment of a dividend of 7 per cent in each of said years to the preferred stockholders; and that it was the duty of the defendant corporation to pay such dividend, and issue such common stock, on the 1st of January, 1886." It is further alleged that "the accounts of the company have been wholly in the interest of the preferred stockholders, and without regard to the interest of the common stockholders, and in disregard of the trust created, and with intent, on the part of the

Rights of holders of provisional certificates to stock certificates.

Payment of dividends on preferred stock—Allegations in complaint.

preferred stockholders and the officers and agents appointed by them, of preventing the common stockholders from having any voice whatever in the management, and with a view to postponing the issue of the common stock to an indefinite period. And your orators are informed and believe, and so aver, that, for this purpose, accounts have not been properly kept of permanent improvements in the property, which should have been paid for as additions to the plant, by way of construction and equipment, out of funds applicable thereto; but that said permanent improvements have been, in fact, paid for out of the current yearly income from the property applicable to dividends. And your orators show that earnings have been diverted from their proper application to dividends, and spent upon the railroad, had upon its road-bed, rails, track, station buildings, and other property, and in the building of branches, especially a branch to the city of Manistee, and in the building of side tracks and sidings, and the purchase and improvement of cars, engines, locomotives, and other equipments; that the operating expenses have in this way been unduly increased, and the net income diminished, all to the prejudice of the common stockholders, in violation of their rights and of the agreement, whether contained in the scheme of reorganization or in the certificate of organization filed with the secretary of state." The bill also alleges that the defendant corporation is entitled to the beneficial interest in the land grants and funds thence arising held by Crapo and Prescott, trustees; that, after satisfying all prior claims and demands thereon under the trust upon which they are held, there is a large surplus belonging to said defendants; that there was, on December 31, 1885, of this funds over \$1,000,000 in bills receivable and cash, besides about 90,000 acres of unsold lands; that since the date of its reorganization in 1880, said corporation had received from said trustees many thousands of dollars, of which only a portion had been applied to construction and equipment of its road; that said defendant has used sums received from the current operation of the road, which properly belong to the net income thereof, for the purposes of construction and equipment, in place of funds applicable thereto from the land department; and that the surplus lands and funds now in the hands of said trustees, and subject to the demands of the company, are properly applicable to dividends in place of the money from earnings and income diverted and applied to construction and equipment, etc. It is further alleged that complainants, and others in like situation, have applied to the management of the defendant company to correct these misapplications of earnings to construction purposes, and to respect the rights of the common stockholders; which requests have been totally disregarded. It is also charged that they have denied access to the books of ac-

count of the company. Aside from the preliminary injunction asked for, which was heard before Mr. Justice Matthews (32 Fed. Rep. 350), the relief sought on this branch of the case is that the court will order such amounts **Relief sought.** from the surplus land funds to be paid into the income amount of the company, applicable to dividends, as will reimburse said income account for any and all sums wrongfully taken therefrom, and spent upon construction or equipment during the period aforesaid; that the defendant company may be ordered to furnish to complainants the accounts received by it from the trustees of the land department, and to render accounts of the sums paid over to it by said trustees; that a true and correct account be made up of the income of the defendant company, from the date of its organization, for each successive year, and that all improper charges to said income may be stricken out, and that any proper additions may be made thereto, and that a balance may be struck each year, and that the income of the succeeding year may be added to the surplus of the year preceding; that the defendant corporation, its officers and servants, be ordered by the court to issue stock certificates to the complainants severally, for the several amounts of shares to which they are entitled; that the defendants may be perpetually enjoined from depriving them of their legal rights as stockholders in voting at the meetings of stockholders, and in other respects; and, generally, that they may have such other and further relief as the nature of the case may require, and to the court may seem meet.

The defendants admit that the holders of preferred stock have been recognized as the only stockholders entitled to any voice in the management and control of the corporation since the time of its reorganization, and that the directors elected by them have had charge of the company and its management; but they deny that the holders of said preferred stock unlawfully combined together. They admit that they have refused to permit the complainants to send their agents into the offices of the defendant company, there to interfere with its business by an examination in detail of the transactions of the corporation; but state that the printed annual reports of the company were open to their inspection. They state, on information and belief, that the accounts of the company have been properly kept as such, and that "no greater amount has been charged to operate expenses than sufficient to cover the actual expenses incurred." As to the charge "that earnings have been diverted from their proper application to dividends, and spent upon the railroad and upon its road-bed, rails, track, station buildings, and in the building of branches, etc., and in the building of side tracks and sidings, and in the

Defendants' answer to preferred stockholders.

purchase of cars, engines, locomotives, and other equipment; that the operating expenses have in this way been unduly increased and net income diminished, to the prejudice of the common stockholders, in violation of their rights and of the agreement, whether contained in the scheme of reorganization, or in the certificate of reorganization,"—there is no direct response or denial; but the defendants say they "admit that, as directors of said company, charged by the law with the duty of managing the same, they have believed that their duty to the public required that they should keep the road-bed, rails, track, station buildings, and other property in good condition; that they should keep the rolling stock sufficient to enable it to transact its business as the public interests might require; and these defendants believe that in so doing they promoted the true interests of the corporation in their charge, and also performed their duty in accordance with law; and, therefore, these defendants deny that the interests of complainants, or others in like state, were prejudiced, or their rights violated." They further "state and insist that their first duty in the management of the defendant corporation is to use the current income and funds for the purpose of maintaining the efficiency of the road, and the value of the property, that the same may not be depreciated, and that the same may be safely operated, and serve the public in accordance with the design of its creation." They also deny that the defendant corporation has received, from time to time, sums of money which should have been added to the net income applicable to dividends, and which they have neglected to add; they deny that the premium received on the sale of bonds should have been treated or applied as income; they deny that the railroad company is entitled to receive or has received from the land department income which should be added to its net yearly income, and be applicable to dividends; they deny that said land funds are applicable to dividends within the meaning and in accordance with the certificate of reorganization, now constituting the charter of said defendant company, "and state the fact to be that they have paid dividends from time to time to the holders of the preferred stock to such an extent as, in the judgment of the board of directors, it was prudent, legal, and honest to do; and they deny that a greater sum has been taken from income for the purpose of repairs, equipment, or other uses than what, in the judgment of the board of directors, the best interests of the property, and all interested therein, considered as a whole, absolutely required; and they deny that complainants, and others in like situation, as holders of provisional certificates aforesaid, have any rights which are superior to the public or of the preferred stockholders, or any rights which would require or justify the defendants, or any of them, to with-

hold money from needed and proper repairs and improvements, in order to force the contingency specified in the certificate of reorganization." They admit that dividends to the extent and percentage stated in the bill were declared and paid the preferred stockholders for the years mentioned; but they do not claim that full 7 per cent dividends for each of said years could not have been paid.

The fourth article of the certificate of reorganization, forming a part of the defendant company's charter, was intended to define the legal relations and relative rights of the two classes of stockholders therein described, and to designate, as between them, the funds of the corporation out of which dividends on preferred stock were to be paid. By that provision of the charter, which is obligatory upon the corporation and its directory, the funds applicable to the payment of dividends on the preferred stock was the net income of the company, "after paying interest on prior bonds, repairs, expenses of equipment and renewals." Any surplus of net income, after the payment of said dividend of 7 per cent upon the preferred stock, was to stand undivided until the next dividend day, and so on, from year to year, until such time as holders of said preferred stock should receive five consecutive annual dividends of 7 per cent, or semi-annual or quarterly dividends equivalent thereto. There was to be no accumulation of dividends on preferred stock. When five consecutive annual dividends, or, in lieu thereof, semi-annual or quarterly dividends equivalent thereto, shall have been paid upon the preferred stock, then the common stock, with the right to vote, was to be issued and delivered to parties who held the certificates issued upon the surrender of the common stock of the old Flint & Pere Marquette Railway Co, or other certificates, which the new company may have issued in lieu thereof. Any surplus of the common stock was to remain the property of the new corporation. At the first meeting of the board of directors under the new organization, a resolution was formally adopted, September 8, 1880, defining the policy of the company, as follows:

Article defining rights of two classes of stockholders.

Resolution of directors—Constructing same.

"Resolved that the board of directors define their policy to be in conformity to the articles of association; that, under the head of operating expenses only such improvements and additions shall be included as are necessary, in the judgment of the directors, to keep the property up to the proper standard of efficiency, and that such portion of additions and extensions beyond this, as the board decides, shall be provided for out of funds other than net earnings; that the stockholders are entitled to the benefit of all net earnings after paying expenses and coupons."

This resolution was never repealed or modified ; and, read in the light of the reorganization scheme, which provided for the issue of reorganized first mortgage 6 per cent bonds, "to be used only to fund the past due and maturing interest on the prior bonds, and for such permanent construction and improvement as may be deemed desirable by the board of directors of the new company," it may fairly be regarded as a correct contemporaneous construction of the meaning and intention of article 4 of the charter, in respect to the duty of the new company and of its management, not only in making proper expenditures, but in keeping proper accounts, as between construction and permanent improvements, or additions and extensions, on the one hand, and operating expenses on the other, upon which the respective rights of the two classes of stockholders were to be regulated, adjusted, and determined. At the next meeting of

Issue of consolidated bonds.

the board, on the 22d day of September, 1880, a resolution was passed authorizing the issue of the new consolidated 6 per cent bonds to the extent of \$5,000,-

000, to be used and appropriated for certain specified purposes, among which, as designated in item 4 of the resolution, were "for such extensions of the road and improvements of the property, including the construction of the Manistee R., the extension of the Saginaw & Clare County R., and the purchase of the Saginaw & Mt. Pleasant R., as may, in the judgment of the directors, be deemed expedient from time to time." These bonds were to be secured upon all the property of the company, except the land assets and land-grant proceeds, held by Crapo and Prescott, trustees. Dr. H. C. Potter was appointed general manager

Manner of keeping company's accounts.

of the railroad company, entered upon his duties as such about October 1, 1880, and has since occupied that relation to the corporation, having the practical control of its business and operations, and directing the manner in which its expenditures should be charged, whether to operating or construction, and the keeping of its accounts, showing receipts and disbursements. The evidence clearly establishes that the company expenditures for operating expenses, and for additions and extensions or permanent construction improvements, were not kept as directed by the resolution of September 8, 1880, nor as the company was bound to do by the fourth article of its charter, so as to preserve the rights of and discharge its obligations impartially between its two classes of stockholders. While the board of directors exercised their proper and legitimate discretion in directing the new works,—additions, extensions, improvements, and equipment that should be made to the road,—they did not designate the account to which the expenditures thereby incurred should be charged. The general manager, directly or indirectly,

through subordinate officers, indicated and directed to what account all expenditures should be charged and receipts credited. In two instances his discretion was so far supervised by the board of directors as to direct \$78,472.59, made up of several items, to be transferred from operating to construction account of the current year, which was done by resolution adopted December 19, 1884, and the depreciation on steamers to be reduced. No question is made as to the correctness of the company's expenditures; but the claim on behalf of the complainants is that their rights have been ignored and disregarded in improperly charging portions of such expenditures to operating, rather than to construction, whereby the net income applicable to dividends under the charter defining their relations to the company and the preferred stockholders, have been reduced to their prejudice. They further claim that receipts and revenues received have not been credited, as they should have been, to income account. It distinctly appears from the testimony of its officers, that the accounts of the defendant company have not been kept with any reference to the rights of the common stockholders; that no regard has been paid to the provisions of the fourth article of the charter in the keeping of the accounts; that the road was not operated with reference to the unpreferred stockholders at all. The general manager states that the books and accounts were kept, "as we thought the proper way of doing and administering, with reference to its [the road's] permanence and safety. We have not operated it [the road] with reference to them [the common stockholders] at all. We have operated it in accordance with the public benefit and the maintenance of the property." His manner of dealing with the expenditures of the road is fairly illustrated in the following question and answer (Record, p. 260): "Question. And therefore you think that the question as to whether a reduction of grade should be charged to construction or to operating expenses, is simply a matter for the general manager to decide according to the state of the finances? Answer. No, sir; according to his judgment." Not only were the rights of the common stockholders not recognized, or considered in the keeping of the company's accounts, but, as stated by the auditor, Mr. Ledlie, no account was kept to show the surplus of net income yearly after the payment of the 7 per cent dividend on preferred stock, as provided for in said fourth article of the charter. The policy thus adopted and pursued by the actual management assumed that the contingent rights and interests of the provisional certificate holders were entirely subject to the discretion of the directors, or those in control of the road, in deciding, not only what expenditures should be made, but how

Same—Policy
assumed by
management—
Interference
by courts.

they should be charged, as between operating and construction. If this position is correct, and it lies with the directors selected by the preferred stockholders to determine how outlays made to meet what they may consider for the best interests of the corporation, or most beneficial to themselves and associates, or for what they may deem necessary in serving and discharging the company's duty to the public, shall be charged, whether to operating expenses, or to construction, then the provisional certificate holders are placed completely in the arbitrary power and at the mercy of the preferred stockholders, and the charter provision, made for their benefit, in pursuance of the reorganization agreement, is practically abrogated, and becomes utterly worthless. While the company, in the exercise of its franchises and the management of its business, undoubtedly owes duties to the public and to its creditors which are paramount to the right of its stockholders, preferred and unpreferred, still this artificial body, called the "corporation," is after all but the representative of its stockholders, and exists mainly for their benefit; and in their interest it is to be governed, controlled, and administered according to the provisions of the charter which the state has conferred. In the absence of charter provisions restricting or qualifying their powers, directors have usually a large discretion in managing the affairs of the corporation, in keeping its accounts as to expenditures, and in deciding whether dividends have been earned and should be declared. While their discretion as to making dividends is not unlimited or conclusive, courts will not ordinarily interfere to supervise or control its honest and reasonable exercise on the ground that shareholders have no unconditional right to a division of profits. *Tayl. Corp.* §§ 562, 563, and notes. If, in the present case, the question was merely one relating to the policy which the company should pursue, or if its duty to the public, or its obligations to its creditors, were involved in a way to affect the company's ability to perform such duty or discharge such obligation, then the foregoing principles would properly apply. But the facts developed by the proof in the case do not warrant the suggestion that these paramount duties are in any way inconsistent with the company's fair and proper observance of its charter duty towards both classes of stockholders, or that the rights of provisional certificate holders could not be recognized and enforced without requiring the company to disregard and neglect its obligations either to creditors or to the public. The company is perfectly solvent; the demands of the creditors have been, and are being, promptly met; and in respect to the public, whose rights are set up as a justification of the policy pursued by the management in not considering the rights of the provisional certificate holders, there is now and has been no

failure of duty on the part of the company. Its road has been maintained in first-class condition, comparing favorably with any line of railroad in the state of Michigan. Year by year its lines have been extended, its equipment enlarged, its tracks and buildings improved, and its efficiency increased. These results have been to a large extent accomplished by the application of earnings to construction purposes, notwithstanding the company had at its disposal funds from other sources more properly applicable to those objects; the general manager, as the representative of the directors, asserting and exercising the discretion of charging all expenditures either to operating expenses or to construction, as he deemed proper. Provisional certificate holders, in November, 1882, entered their protest against this course; but their complaint was utterly ignored by the board of directors, and their general manager continued to divert portions of the net income to permanent construction purposes. This refusal on the part of the directors to respect the rights of the common stock partakes more of disregard of duty than of error in judgment. It was a non-performance of official obligation, amounting to what the law considers a breach of trust, if the complaint was well founded, and made by parties entitled to have their policy as to earnings changed.

But the position is broadly assumed in the answer and in the argument of counsel for defendants that the board of directors, being charged with the power and duty of managing the corporate property and franchises for the best interests of the company, and for the benefit of the public, had the right; and were entitled to dispose of and apply the net earnings of the company in the same way, or in as unrestricted manner, as they would have had if the charter had contained no such provisions as are found in article 4, and there had been but one class of stockholders; and that their discretion in appropriating net income for construction purposes, as they saw proper, and in withholding the same from dividends, could not, at the instance or upon the complaint of the contingent shareholders, be controlled by the court. Can this proposition be sustained without practically nullifying, or destroying article 4 of the charter? We think not. The reorganization scheme contemplated a fund applicable to construction and equipment other than earnings, and the fourth article of the new corporate constitution undertook to define what expenditures should be borne by net income, as between the two classes of stockholders. The provisions of that article constitute some restriction upon, or qualification of, the powers of the board of directors, which may not, at their option, be disregarded or ignored. If that article of the organic law of the corporation confers upon the provisional certificate holders

Authority of directors to act contrary to provisions of article 4.

any rights or interests, even though contingent, there must co-exist with such rights the correlative duty on the part of the company and its management to observe and respect those rights, and especially so when the preference class are in exclusive control of the corporation. This correlative duty and obligation on the part of the company and its management necessarily implies and involves the keeping of proper accounts as between construction and operating expenses, and the proper application of net income to the purposes indicated, and only to those purposes, to the end that a fair opportunity may be allowed for the happening of the contingency on which the provisional certificate holders were to be admitted into the company. The true import and meaning of article 4 of the charter is that, when the company's net income, after paying certain specified charges and expenses, is sufficient to pay a 7 per cent dividend on the preferred stock, it shall be so applied, provided the rights of creditors are not affected, and be continued for five successive years if in condition to do so from net income, to the end that provisional certificate holders may then be let into the company, and be entitled to a voice in its management, and to share in future earnings in excess of further 7 per cent dividends. It operates as a charter direction to the management in the interests of the common stock, and limits the discretion which the directors might otherwise exercise in applying the net earnings, or net income of the company.

It may be true, as argued by defendant's counsel, that the preferred stockholders could not have compelled the board of directors, selected by themselves, to declare larger dividends than were declared and paid from 1881 to 1885, inclusive, as held by the supreme court in New York. *Railroad v. Nickals*, 119 U. S. 296, and similar authorities, which rests upon the principle that, in the absence of charter provisions controlling or modifying their usual powers, courts will not generally review or control the discretion of directors on the subject of making or withholding dividends, when honestly and fairly exercised. But the present does not fall within that class of cases, nor is it controlled by them, because the rights here asserted are charter rights, imposing charter duties, binding and obligatory upon both the company and its managing officers, and operating as restrictions and limitations upon the general discretion of the directory in dealing with the net income of the road as between the preferred and unpreferred stockholders. The question in the present case is not therefore, what regular stockholders, having a voice or vote in the selection of the corporate management, may demand and enforce in the way of having dividends declared and paid; but it is whether the contingent shareholders, having no voice in

Same—Interference with discretion of directors.

the corporation or its direction, are entitled to have the company and its directors selected by and from the preferred class, observe and respect their rights by carrying out the charter provisions in their favor. It is not a sound proposition, as applied to this case, that the directors, selected by and from the preferred class, have and may exercise the same discretion as against the provisional certificate holders in dealing with, disposing of, or applying the net income of the company, which they might be entitled to exercise as against the preferred stockholders. They were entitled, as between the two sets of stockholders, to employ the net income in paying interest on prior bonds, old or new; in making repairs upon the road, buildings, and other property of the company, so as to maintain their efficiency; and in meeting the expenses of equipment and renewals, which evidently refers to repairs upon and keeping up of the rolling stock of the company, but does not include the purchase of new equipment. The company from the start adopted this construction as to the expenditures chargeable against income, as shown by the resolution already referred to, passed at the first meeting of the board of directors.

With this limitation upon the company and its directors in the way of expending earnings as between the two classes of shareholders, we may next consider what net income applicable to dividends were earned or received during the years 1881 to 1885, inclusive, and the manner in which the management of the company has dealt with or disposed of the same, or, generally, whether the company could reasonably and properly have declared and paid full seven per cent dividends during each of said years. As to the surplus lands and proceeds of land sales in the hands of Crapo and Prescott, these were undoubtedly equitable assets of the defendant company corporation, acquired under the trust conveyance of August 23, 1879, and the foreclosure sale, purchase, and reorganization in 1880. Subject to the prior mortgage lien, or liens on said lands, and land proceeds, the company was the beneficial owner thereof, and held the equitable title to the same. In respect to these surplus assets it had something more than the simple right to call the trustees to an accounting. It was the real equitable owner of the property; and the surplus thereof, after satisfying prior incumbrances, belonged to the corporation, just as it held its other property subject to mortgage. As the absolute owner of this equitable title and right in said surplus lands and proceeds arising from the same, whatever the company received from that source was as much a part of its income or revenues as if it had been derived from any other source, such as receipts from operating its road, or rents collected for the use of its cars or other property. In-

Net earnings
applicable to
dividends re-
ceived from
1881 to 1885.

come is not limited to the gain which results from business and labor, but it includes as well the proceeds derived from the use or sale of property. Now, what is the situation of these land assets, and what revenues have been actually derived therefrom during the years in question, or could have been received from that source, without impairing or interfering with the rights of creditors? When the new company acquired its right to these lands and assets, the prior charges thereon amounted to about \$2,000,000. Of those prior bonds remaining on January 1, 1881 (Report of company for 1880, p. 21), there were \$1,704,000 of 8 per cent land-grant bonds, and \$300,000 of Flint & Holly 10 per cent bonds. During 1881 the former were discharged, partly by funds in the hands of the trustees and partly by exchange of new 6 per cent bonds of the company; so that, at the close of 1881 the \$300,000 of Flint and Holly bonds constituted the only incumbrance on these land assets. They were also secured by a mortgage on the Flint & Holly branch of the company's lines of road. Now, on December 31, 1881, as shown by the company's annual report, the trustees had in their hands a balance of \$575,978.77, arising from land sales, while the land commissioner who made the sale held bills receivable, amounting, principal and interest, to the sum of \$902,058.73, and the unsold lands held by the trustees amounted to 138,454.28 acres, worth about \$10 per acre. Here, then, were \$2,863,577.88 of good assets in the hands of said trustees to secure \$300,000 of 10 per cent bonds, which were also secured by mortgage on one of the company's main branches. The cash balance in the hands of the trustees exceeded this bonded debt by \$275,978.77. The dividend declared and paid for 1881 was $5\frac{1}{2}$ per cent,—less than 7 per cent by $1\frac{1}{2}$ per cent,—which, on the whole \$6,500,000 of preferred stock, amounted to \$97,500. If this amount had been drawn by the company from the hands of the trustees, the full 7 per cent could have been readily declared and paid without in the least impairing the security held by them for the payment of the \$300,000 Flint & Holly bonds. On December 31, 1882, said trustees held a balance of \$598,117.28. The bills receivable from sales of lands in the hands of the land commissioner amounted to \$747,532.78, and there were unsold lands to the extent of 109,815 $\frac{1}{2}$ acres, worth, upon an average, say \$9 per acre, or \$988,340, making an aggregate of \$2,133,989.78, controlled and held by the trustees to secure said \$300,000 of bonds. In 1882 the dividend declared and paid was $6\frac{1}{2}$ per cent. The deficiency of $\frac{1}{2}$ per cent, or \$32,500, was actually in the hands of the company, as shown on page 6 of its annual report for that year. For that year it had a surplus of \$35,613.52, after paying the $6\frac{1}{2}$ per cent dividend, which was carried over to 1883. It could have paid the 7 per cent for the year 1882, without

drawing on the land funds; but, if there had been an actual deficiency of income of \$32,500 from other sources, it could have been withdrawn from the land assets, without in any wise impairing or endangering the security for the payment of the \$300,000 bonds. In 1883 and 1884 full 7 per cent dividends were declared and paid, leaving in the hands of said trustees large surplus assets, as follows, viz., on December 31, 1883, the balance in their hands was \$681,259.29, the land commissioner held \$627,021.55 in bills receivable, and there were 103,619.42 acres unsold, worth \$932,574, aggregating \$2,240,854.84 of available assets charged with only \$300,000 of liability; on December 31, 1884, the balance in the hands of the trustees was \$693,681.33, the bills receivable from lands sold were \$492,334.14, and there were 101,009.27½ acres unsold, worth \$900,000, aggregating \$2,086,015.47 of security, charged with \$300,000 of bonds. On December 31, 1885, there remained of unsold lands 95,914.22 acres, worth upon an average, say \$6 per acre, or \$575,485, and the trustees held in their hands, as stated by Mr. Crapo (pages 596, 597 of the Record), funds to the amount of \$764,556; of that amount the sum of \$579,000, was invested in Flint & Pere Marquette Railroad new 6 per cent bonds, while the balance, except perhaps a small cash deposit arising from daily receipts, was loaned out at interest,—partly to the defendant corporation, to whom this surplus fund belonged, and which paid interest thereon, which was charged to operating expenses. For the year 1885 the company only declared and paid a dividend of 4 per cent on the preferred stock. The 3 per cent shortage, amounting to \$195,000, could readily, safely, and properly have been withdrawn from the large surplus in the hands of the trustees, without in the least impairing or endangering the security for the payment of the \$300,000 of Flint & Holly bonds, which constituted the only charge against the funds and assets held by the trustees. The \$579,000 of Flint & Pere Marquette 6 per cent bonds, which the trustees held, were worth in the market, and are still worth, a premium ranging from 15 to 20 per cent. If the deficiency of \$195,000 had been withdrawn from the hands of the trustees, they would have still held \$384,000 or more of the company's 6 per cents, worth a premium of 15 per cent, as security for the \$300,000 of Flint & Holly bonds, beside unsold lands worth \$575,485. On the 31st December, 1886, the balance in hands of the trustees had swelled to \$826,852.73. The \$300,000 Flint & Holly bonds mature May 1, 1888. To say nothing of the branch road mortgaged for their payment, the trustees have for years held, and now hold, funds and assets for the security of these bonds, exceeding fourfold the amount needed, or necessary for their payment. This large surplus the company or its management have

intentionally declined to draw upon for the purpose of making dividends, or of returning to income sums that were improperly charged to operating expenses, except in 1884, when the board of directors, after directing the general manager to transfer \$78,472.59 from operating to construction account, called upon and received from said trustees \$100,000, which was used in making the dividend of that year. Why could not the \$195,000 required to make up the 7 per cent dividend for 1885 have been called for from the same source? Why was it not called for and so applied? The board of directors, by resolution passed December 13, 1883, "resolved, that the trustees of the land funds be authorized to pay over to the treasurer of the company, from time to time, all land funds which shall come into their hands, in excess of what may be required to pay the securities outstanding, for which said land funds have been specially pledged, and all such payments heretofore paid by them to the treasurer be confirmed and approved." The land funds in the hands of the trustees at the close of 1885 in excess of what was required to pay the \$300,000 of Flint & Holly bonds (the only securities outstanding and chargeable against said fund) was more than \$400,000. Out of this excess, \$195,000 for 1885, could have been drawn either to apply on dividends, or to restore to income or earnings what had been diverted from that fund, and applied to construction or new equipment. But, for some reason not explained, this was not done.

Now, aside from the \$100,000 received from the trustees under the resolution of December 19, 1884, how has the company or its management dealt with the moneys actually received from these land trustees? It appears that from October 1, 1880, to the close of 1885, said trustees paid over to the treasurer of the company at various times, as requested, sums of money aggregating \$1,221,168.62, and which was used by the company as follows, viz., \$646,000 in paying off 8 per cent land grant bonds, \$100,000 for Bay City & East Saginaw bonds, \$22,118.09 for improvement of Bayou Spur property in East Saginaw, \$81,000 for coupons on Flint & Holly bonds, \$4,500 and \$22,550.53 for interest received, and \$345,000 for the company's use, and which went into the general treasury, and was used "according to the necessities of the company for pressing needs of any kind," as stated by the general manager. But this \$345,000 is not credited to income or earning. In the keeping of the company's accounts the provisional certificate holders are not allowed any benefit from this receipt. It is not permitted to go into earnings or income account. If that had been allowed, it would have more than covered the shortage in the 7 per cent dividends for the five years in question. In other words, if that sum had been treated as applicable to dividends, or as an equitable restoration

to earnings or income of what had been applied to construction, full 7 per cent dividends could have been declared and paid during the five consecutive years under consideration. But how were these large receipts from the land assets disposed of in the company's account? By reference to the annual report for 1884 (pages 15 and 24) of the vice-president and general manager, it will be seen that the sum of \$1,105,276.97, received from sales of lands and premiums on bonds (the latter item amounting to \$164,541.25,) was charged to depreciation, and deducted from the road-bed and equipment account of the company. This latter account was, at the same time, further reduced by a credit of \$10,793.48, being the proceeds of narrow-gauge equipment, telegraph line, and portable engine sold. No depreciation account was kept by the company, as the general manager testified (page 344, Record), and, year by year, operating expenses, were charged with all repairs and expenses of equipment and renewals made or incurred in, about, or upon the road-bed, rolling stock, buildings, or other property of the company, as contemplated and provided by article 4 of the charter, and then, at the close of 1884, a lumping charge of \$1,116,070.45 is made to depreciation, and deducted from the road-bed and equipment account. While doing this the management of the company, without reason and in disregard of the rights of the provisional certificate holders, keep large surplus land funds in reserve, portions of which it borrows from the trustees from time to time, and pays interest upon its own funds, which is charged to operating expenses, to the prejudice of the unpreferred stockholders, who are excluded from any voice in the management of the corporate affairs. The court is unable to understand upon what principle the receipts or revenues derived from the surplus land assets are to be distinguished from other income or earnings of the company applicable to the payment of dividends under the facts of this case. These land assets were brought into the company by the consent of the old common stockholders, under the trust conveyance of August 23, 1879, made manifestly in furtherance of the reorganization scheme. But whether that creates any equity or not in favor of the provisional certificate holders, they have the same interest in these land assets that they possess in other property of the company, and the funds derived from that source are just as applicable to the payment of dividends on the preferred stock, so as to meet the contingency on which the unpreferred class are to be let in, as revenues derived from operating the road, or renting its cars and dining stations. The principle announced in *St. John v. Railway Co.*, 22 Wall. 149, where it is said: "We are aware of no legal principle which would authorize the stockholders in

Same—Revenues derived from surplus land assets.

question to analyze the business, select out a portion of it, and to say that the net earnings specified must be a predicate of that part and none other," applies here. So in *Ryan v. Railway Co.*, 21 Kan. 365, the court says, in considering the rights of stockholders in reference to the sources from which profits are made, "that it is immaterial at what time or from what sources these profits may have been derived. It is wholly immaterial whether they have accrued from rents, the profits of the construction of the road, or from the sale of lands equitably belonging to the company, they are all incidents to the shares." Without refer-

Surplus land funds at disposal of company to pay full dividends.

ence, therefore, to the diversion of income, or the improper application of earnings to construction, or the charging to operating expense what properly belonged to construction account, but taking the company's reports as made, and the dividends annually declared on the net earnings there shown, it is clear that there was at the disposal of the company ample surplus land funds in addition to such net earnings, to have made and paid full 7 per cent dividends for each of the years 1881, 1882, 1883, 1884, and 1885, without in any way impairing the rights of its creditors, or neglecting its duty to the public. In the judgment of the court, fair dealing and a due regard to the contingent rights of the provisional certificate holders, required of the management that funds thus at their disposal should have been applied in making the full 7 per cent dividends for the five years, so as to let the unpreferred stockholders into their inheritance. Is it to be said in a court of conscience that the preferred stockholders in charge of the corporate management and affairs, may have at their disposal ample funds to meet the contingency, and comply with the event on which the unpreferred class are to be let into their rights; that they may arbitrarily decline or wrongfully neglect to receive and apply such funds, so that the happening of the contingency is thereby postponed, and that they, or the corporation controlled by them, may thereafter set up and rely upon such contingency as an excuse or defence against the admission of such unpreferred class into their corporate rights and privileges? To state this proposition is enough. A court of equity will not permit parties occupying towards each other either legal or trust relations, whether direct or through the instrumentality of an artificial body called a "corporation," thus to act, and thereby postpone or defeat the rights of the defendant class.

Income derived from other sources than from surplus land funds.

But, aside from the surplus land funds and assets, how stands the case in respect to income and earnings derived from other sources? Were they sufficient, if fairly and properly applied, according to the true meaning of the article 4 of the charter to have paid full 7 per cent dividends on the preferred stock for the five

consecutive years in question? This can only be determined by an analysis and examination of the company's accounts, showing receipts and disbursements during said period. It appears that the total issue of the company's new 6 per cent bonds amounted to \$3,924,000; that of these \$1,058,000 were exchanged for 8 per cent land-grant bonds; that the land trustees purchased over \$500,000 of said bonds at par, and that the residue thereof were sold at a premium, ranging from 5 to 10 per cent. This premium on its bonds sold was received by the company as follows, viz.: \$500 between October 1, 1880, and January, 1881; \$107,257.25 during 1881; \$34,702.50 in 1882; \$12,136.50 in 1883; and \$9,945 in 1884, aggregating \$164,561.25. This premium was, at first, set upon the credit side of the company's ledger, or placed to the credit of construction, and afterwards, as shown by the annual report for 1884 (page 15), it was included in the amount of \$1,105,276.97, charged to depreciation, and deducted from road-bed and equipment account. This premium was received by reason of the rate of interest which the bonds bore, and the ample security provided for their payment. Earnings were charged with the payment of that interest on account of which said premium was earned or received; and it would therefore seem to be proper to credit earnings or income with the amount of such premium. If income is burdened with a rate of interest which secures a profit on the bonds, then income is entitled to the benefit of that profit, just as it would be entitled to the profits made on any contract by the company. In crediting such premium to earnings and profits, there is no increase of the bonded debt, nor improper enlargement of the company's construction account. It is apparent that 5 per cent bonds, secured as these were, could have been negotiated at par. In carrying 6 per cent, earnings are charged with the extra burden of \$39,240 annually. It is therefore reasonable and proper that income should have the benefit of the profit which has been derived from the extra charge placed upon such income. The experts differ in opinion as to the proper disposal to be made of such premiums on bonds, and there is no uniformity in the practice of railroads in respect to such profits. In the judgment of this court, such premiums, in the present case, as between the two classes of stockholders, should have been credited to income during the respective years in which the same was received.

Next, as to the steel-rail account. At the close of 1880 the mileage on the main line of the road was 317.17 and 90.40 miles of sidings. Of the main line 200 miles were laid with steel rails. At the close of 1881 there were 345.16 miles in the main line and 111.29 in sidings and spurs, 283 miles of which were

laid with steel rails (being an increase of 83 miles) during 1881, (page 5, annual report for 1881). At the close of 1882 the main line and sidings amounted to 485.62 miles laid with steel rails, being an increase in steel rails over 1881 of 19.72 miles. At the close of 1883 the main line was 361.31 miles; sidings and spurs 175.17; total 536.38 miles, with 341.31 miles on main line and 18 miles on branches laid with steel rails, being an increase in steel mileage over 1882 of 56.59 miles. At the close of 1884 there were 369.91 miles laid with steel rails, an increase over 1883 of about 10 miles. At the close of 1885 the main line, sidings, branches, and spurs amounted to 543.12 miles, of which 373.88 miles were laid in steel, an increase over 1884 of 3.97 miles of steel rails. Now, with the exception of some comparatively small amounts expended in 1884-85 on the yards at East Saginaw, Flint, and Evart, not a single dollar was charged to construction, or for betterments on the main line of the company's road for the years 1881 to 1885 inclusive. During that period about 15,772 tons of steel rails were purchased and paid for out of earnings. While the accounts of the company are in much confusion on that subject of these steel rails, it appears from defendant's Exhibit G that the cost of these rails, with freight and fittings, after deducting what was on hand at close of 1885, amounted to about \$900,346.10, while the total amount charged to construction as against this expenditure for the same period was only \$540,616.81, and this was on the construction account for branches, sidings, spurs, and yards. Earnings were burdened with the difference, exceeding \$359,000. Brown, the road-master, places the cost of steel rails during said period at \$737,063.82. If from this is deducted the \$540,516.81, charged to construction there will be left \$196,547.01, which was borne by earnings for purchase cost of steel rails. The practice of the management was to remove the old iron rails from the main track, and use these in laying sidings, as required, and to put new steel rails in the main track in place of the old iron rails taken up. The difference between the cost of the new steel rail laid down on the main line, and as laid down, and the value of the old iron rail taken up, was charged to operating expenses, under the head of repairs to roadway, or "track repairs." Thus, in the report for 1881, it is stated that 4000 tons of steel rails were laid down on the road. The cost of this, less the value of old rails removed, was fixed at \$133,779.09, which was charged to operating expenses, as "track repairs." The purchase cost of this 4000 tons of steel rails, with fittings, to say nothing of the expense of making the change, was \$240,000. In 1882 a similar charge was made to operating expenses for steel rails put down, to the amount of \$31,224.56.

During that year there were laid 1697 tons of steel rails which cost \$36,365. In 1883 the increase in steel-rail mileage on main track and sidings was 56.59 miles. Counting 38 tons to the mile, and the cost of steel rails at \$37 per ton, this increased cost of steel rails alone was \$184,257.04. For 1884 the cost of the steel rails used on the main line was about \$32,560; and in 1885 about \$12,926.32, aggregating \$371,850 for steel-rail betterments, which was charged to operating expenses, and taken out of earnings. The complainants' expert, Jones, makes this expenditure for 1881, 1882, and 1883, as shown by defendant's Exhibit G, amount to \$250,465. By taking the total cost of steel rails and deducting therefrom the amount charged to construction, old scrap rails sold, and what was on hand at the close of 1885, he makes this expenditure amount to \$277,035.41, which, in the judgment of the court, is a most reasonable estimate; below, rather than above, the actual outlay for steel rails used in improving the track. The old iron rails, together with some light-weight steel rails taken from the main line, were used in sidings, spurs, and branches. A portion of these were charged to construction account, the old rails being charged at their estimated value. But a considerable portion of such sidings, spurs, and branches, as shown by the road-master, Brown, were made at the expense of earnings. The extension of sidings and spurs from October 1, 1880, to December 31, 1881, thus charged to operating expenses, was something over 12 miles, of which the estimated cost, as made by the road-master, was \$45,430. For 1882 there were 2.41 miles of net extension made at the expense of earnings, involving an estimated expenditure of \$3640. In 1884 there were 4.29 miles of net increase in such extensions, involving, as estimated by the road-master, an expenditure of \$16,690. In 1884 the net increase of such sidings was 3.82 miles, involving an expense of \$11,460; and in 1885 there was a net increase of sidings to the extent of 2.59 miles costing \$5400, aggregating, during the five years, \$88,890. If the whole cost of the steel-rail betterments placed upon the road had been charged to construction account, as it should properly have been, as between the two sets of stockholders, then the items making up this aggregate of \$88,890 might properly have been borne by earnings as operating expense; but, instead of doing this, the road-bed, or track, is improved by substituting new steel rails for old iron rails; the difference in their value is charged to operating expense, and taken out of earnings; and then, when the old rail is used for sidings and spurs, it is charged sometimes, when the management think proper and so direct, to construction, and at other times no charge is made to construction, and the whole expense of the change, and the entire cost

of the siding or spur is made to fall upon the earnings. The "repairs," which article 4 of the charter provided should be paid out of net income, did not, as between the preferred and unpreferred, or provisional stockholders, warrant this method of dealing with the earnings of the company. It was neither just nor fair towards the latter class. Its effect was, not to keep the track in repair,—in the same state of efficiency as it existed in on October 1, 1880,—but to improve and enhance its value at the expense of earnings, which are thus reduced, and the provisional stockholders correspondingly postponed in coming into the company. If necessary to the assertion of complainants' rights, this court would order the whole steel-rail account to be charged to construction, and earnings credited back with all that has been expended therefrom for or on account of steel rails and steel improvements. But, without changing the account to that extent, the conclusion of the court is that at least \$250,000 should be charged to construction on account of steel rails laid in the main tracks, and for outlays connected therewith, such as cost of work train, transportation of materials, etc., and that this sum should be credited back to earnings; and further, that earnings should be credited, and construction charged, with the \$88,890 expended on sidings, as above stated. The expert testimony in the case warrants these changes, which are, moreover, within the true meaning and reasonable intent of the charter provisions of the company, on which the rights of both classes of stockholders depend.

Again, in 1883 two steamers owned by the company were enlarged and made more efficient, at a cost of \$40,286.44, which was paid out of and charged to earnings. This change was made in the steamers to meet the demands of a new class or character of business, which sprang up shortly before, across Lake Michigan to Milwaukee. It was an addition of substantial and permanent character, which increased the value of the steamers to that extent, and the cost of the change should, in the opinion of the court, be charged to construction. It was actually charged to operating expenses, and taken out of earnings. This should be corrected by crediting that amount back to earnings for the year 1883. In 1884 there was a charge against expenses for depreciation on these steamers amounting to \$6000. In 1885 there was a like charge for depreciation, and also a charge of \$2500, as depreciation on dining-halls, the three charges making \$14,500. These sums were not actually expended out of earnings, but were estimated and charged against operating expenses. This was not proper. No depreciation account was either kept or warranted by the charter as between the two classes of stockholders, and, no expenditure having actually been made to meet

such depreciation, the estimated amount thereof could not properly be deducted from earnings, or net income. *U. S. v. Railway Co.*, 99 U. S. 459. The sum of \$6000 should therefore be credited back to earnings for 1884, and \$8500 for 1885.

In the spring of 1884, \$142,000 was expended, under the orders of the board of directors, for 8 new freight engines and 200 coal cars. The funds for this purchase were raised by loan, which was paid off by the company at the rate of \$3000 per month, and the sum so paid, in addition to interest on the loan, was charged to operating expenses, and withdrawn from earnings. See Reports for 1884, pp. 8, 23, for 1885, p. 8. This was clearly an improper charge against operating expenses. The outlay was not for the repair or renewal of old, but for the purchase of new, equipment, and should have been charged to construction. Fifteen thousand dollars were thus wrongfully charged in 1884, and \$36,000 in 1885. These amounts should be credited to earnings for said years, respectively, and be charged to construction account.

During the years 1882, 1883, and 1884, earnings were charged with interest on temporary loans to the extent of \$24,958.90. Whether these constitute a proper charge against net income or earnings, under the provisions of article 4 of the charter, admits of considerable question; but in the view which the court takes of other items of the company's accounts, as between construction and operating expenses, it is not necessary to pass upon the point. So, too, in reference to the sum of \$4,225.28, charged to profit and loss on an old claim brought over from assets of the receiver. There are various other items which complainants insist, and which the experts testify, should not be charged to operating expenses, or which should go to construction, or be credited to earnings, but they need not be specially noticed, except as to dividend on the company's securities. A word of explanation is necessary as to this source of income. The whole \$6,500,000 of preferred stock was not actually issued. Only \$6,342,000 was issued, leaving in the hands of the company \$158,000 of said preferred stock, the dividend on which the management credited to net income or earnings, as dividends on the entire \$6,500,000 were charged against such earnings. If 7 per cent annual dividends are to be charged on the whole preferred stock of \$6,500,000, then the company should credit earnings annually with \$11,060, being 7 per cent on the \$158,000 of stock still held by the company; or, in stating the account of earnings over operating expenses, said dividend should be charged only on the preferred stock actually issued, amounting to \$6,342,000, making the annual dividend charge \$443,940, instead of \$455,000, as shown by the reports. The result will be

the same under either method. It appears that the company's net earnings for the period from October 1, 1880, to December 31, 1880, was \$132,584.69. If there is added to this the sum of \$500,—the premium on bonds sold during that period,—we have the sum of \$133,084.69 of income to be carried forward as applicable to dividends for 1881. Then, taking the net earnings and adding thereto the corrections, or credits due to earnings, as above indicated, the account for the several years will stand as follows:

Amount over from 1880 and applicable to dividends,	\$133,084 69
Net earnings, as reported by company, for 1881,	\$244,037 94
Add: Premium on bonds sold that year,	107,257 25
Relaying track with steel rails,	133,779 09
Spurs and main line sidings,	45,430 00
Balance on Co. securities not cred.,	2,357 50
	<hr/> 532,861 78

Total applicable to dividends,	\$665,946 47
Less 7 per cent dividend on \$6,500,000 of preferred stock,	455,000 00
	<hr/> \$210,946 47
Surplus carried to January 1, 1882,	

1882.

Surplus for 1881 brought over to 1882,	\$210,946 47
Net earnings reported for 1882,	\$438,989 89
Add: Premium on bonds sold 1882,	34,702 50
Relaying track with steel rails,	31,224 56
Spurs and sidings made out of earnings,	9,640 00
Bal. of dividend on Co. stock,	647 00
	<hr/> 515,203 95

Total applicable to dividends in 1882,	\$726,150 42
Less 7 per cent dividend on \$6,500,000 preferred stock,	455,000 00
	<hr/> \$271,150 42
Surplus carried to 1883,	

1883.

Surplus from 1882,	\$271,150 42
Net earnings reported for 1883,	\$488,799 13
Add: Premium on bonds sold in 1883,	12,136 50
Relaying track with steel rails,	65,000 00
Spurs and sidings made out of earnings,	16,960 00
Enlargement of steamers,	40,286 44
	<hr/> 623,182 07

Total applicable to dividends in 1883,	\$894,332 49
Less dividend of 7 per cent on \$6,500,000	455,000 00
	<hr/> \$439,332 49
Surplus carried to January, 1884,	

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1884.

Surplus from 1883,		\$439,332 49
Net earnings reported for 1884,	\$400,303 40	
Add: Premium on bonds sold 1884,	9,945 00	
Relaying track with steel rails,	10,000 00	
Spurs and sidings made with earnings,	11,460 00	
Equipment renewals,	15,000 00	
Depreciation on steamers, charged to expenses	6,000 00	
	<hr/>	452,708 40
Total applicable to dividends in 1884,		\$892,040 89
Less 7 per cent dividends on \$6,500,000,		455,000 00
		<hr/>
Surplus carried to January 1, 1885,		\$437 040 89

1885.

Surplus from 1884,		\$437,040 89
Net earnings reported for 1885,	\$272,451 77	
Add: Relaying track with steel rails,	9,996 35	
Spurs and sidings made with earnings	5,400 00	
Equipment and renewals charged to expenses,	36,000 00	
Depreciation of steamers and dining-hall,	8,500 00	
Dividend on Co. securities,	4,740 00	
	<hr/>	337,088 12
Total applicable to dividends in 1885,		\$774,129 01
Less 7 per cent dividend on \$6,500,000,		455,000 00
		<hr/>
Surplus January 1, 1886,		\$319,129 01

If, as the experts testify, the expenses of work trains engaged in construction, and freight on material used for construction, should be charged to construction account, and corrections were made in that respect, the annual balance, after deducting the 7 per cent dividend, would be still larger than as above given. It thus appears that, independently of the surplus land funds, the earnings or net income of the road, if the accounts between construction and operating expenses had been properly kept, in conformity with the provisions of the charter, and according to the rights of the two classes of stockholders, as therein defined, were amply sufficient, after paying interest on the company's entire bonded debt, repairs, and expenses of equipment and renewals, to pay the annual dividends of 7 per cent on \$6,500,000 of preferred stock for the five years in question. But, when the large surplus land fund is taken into consideration, it is difficult to see any reason for not declaring and paying that dividend for five consecutive years, except a deliberate purpose to keep the provisional certificate holders out of any voice or vote in man-

Earnings sufficient to pay 7 per cent dividends.

agement of the company, or to indefinitely postpone their admission. The 5 per cent deficiency in dividends for the five consecutive years under consideration on the \$6,500,000 of preferred stock actually issued amounts to \$317,100. This could have been readily withdrawn from the surplus land funds if earnings had been inadvertently diverted to construction, and the management had desired to replace the amount, so as to make it applicable to dividends; or, if improper charges to earnings had not been made from year to year, as already shown, the deficiency would not have existed. While the earnings have been thus misapplied or diverted, the policy of the management has been steadily in the line of permanent improvements, and large enhancement in the value of the company's property. Its equipment has been greatly enlarged, its main tracks, sidings, spurs, and branches have been extended, and its general efficiency not merely maintained, but largely increased. When the company took possession in October, 1880, the road-bed and equipment were valued at \$9,671,958.90. On the 31st December, 1880, that valuation had increased to \$10,311,193.38. At the close of 1881 the valuation of road-bed and equipment had increased, as reported by the general manager, to \$12,281,853.02. At the close of 1882 it had grown to \$12,966,601.64. At the close of 1883 it was reported at \$13,506,231.94. At the close of 1884, after deducting \$1,116,070.45, charged off to depreciation, the valuation stood at \$12,657,430.55, and on December 31, 1885, it was placed at \$12,512,928.81. If the arbitrary deduction had not been made in 1884, the valuation at the close of 1885 would have stood at \$13,628,999.26, making an increase since October 1, 1880, of \$3,957,040.36; an amount exceeding the provisional certificates now seeking admission as unpreferred stock in the company. These valuations are independent of the large surplus lands and land funds. Look at the condition of the company from another standpoint. Its total funded debt is \$5,299,000, while the preferred stock actually issued is \$6,342,000, making its total capitalization \$11,641,000. It has 361.64 miles of main line, and 115.72 miles of business producing tracks in addition; making 477.38 miles of roadway, on which there is of capital and funded debt only \$11,641,000, or less than \$25,000 per mile. The capitalization and funded debt of other railroads in the state of Michigan, it is said, will average about \$45,000 to the mile. Under these circumstances, neither the company nor the preferred stockholders who control its management, which has been conducted more with a view to the permanency and security of their own interests than with regard to the rights and interests of the common or unpreferred stockholders, can rightfully longer exclude the latter from their

Preferred
stockholders
conducting af-
fairs in their
own interest.

charter share in the corporate enterprise. This suit is practically a contest between the two classes of stockholders. The preference class is in control, and is interested in keeping the other out. This result has been so far effected by expending the company's earnings and income in permanently improving the property, or for other purposes than those contemplated by article 4 of the charter, whereby net income applicable to dividends has been reduced, while the valuation of the company's road-bed and equipment has steadily increased. The preferred class, in control, select the management. This management, or directory, are more than mere agents of the company. They occupy a fiduciary relation towards the unpreferred class of shareholders, in respect to the rights conferred upon them in and by the company's charter. They neglect or deliberately disregard the duties and obligations growing out of such trust relation, and then attempt to shield themselves, or defend their conduct on the ground that they were only discharging the company's duty to the public. The facts of the case do not sanction this defence.

The court, having been compelled carefully to examine the evidence, which is quite voluminous, and analyze the company's accounts, so as to determine the rights of the parties, and being fully satisfied from this investigation of the accounts that the foregoing statement in respect to the yearly income applicable to dividends is substantially correct, it is not deemed necessary to refer these matters to a special master for a report, and thereby further delay the final disposition of the case. The conclusions of the court on this branch of the case are that complainants are entitled to the relief sought; that they are entitled to be admitted into the defendant company as regular stockholders of the common or unpreferred class; that this right accrued to them and to others similarly situated on January 1, 1886; that a sufficiency of surplus land funds is in the hands of the land trustees, and subject to the control of the company to pay, or make good, the deficiency of $1\frac{1}{2}$ per cent, or \$95,110, on dividends for 1881; $\frac{1}{2}$ per cent, or \$31,710, on dividends for 1882; and 3 per cent, or \$190,260, on dividends for 1885, upon the preferred capital stock actually issued, amounting to \$6,342,000; and the defendant company should be required to pay over to the preferred stockholders, *pro rata*, out of said surplus land funds or other funds at its disposal, said annual deficiencies, so as to make up to said preferred stockholders their full 7 per cent dividends for five consecutive years, and thus comply with the conditions, as the company and its management should have done, on which the provisional certificate holders were entitled to be admitted; and, further, that the defendant company, its officers and agents, should be enjoined from depriving complainants, or those in like state with them,

Conclusions of
the court.

of their rights as common stockholders, in voting or otherwise, and from applying the income and earnings of the company, without the consent of said common stockholders, to improvements of a permanent character; all of which is accordingly ordered and decreed, with the further direction that the defendant corporation, its officers and directors, be ordered to issue regular certificates for common or unpreferred stock in the company to complainants and other holders of provisional certificates, severally, according to their respective holdings of the latter certificates, and upon the production and surrender of the same.

In the case of Parker *et al.* v. Flint & Pere Marquette R. Co. and the Port Huron & Northwestern R. Co. *et al.* the same provisional certificate holders as in the other suit seek on behalf of themselves and others with like interests to restrain the Flint & Pere Marquette Co. from purchasing the stock and franchises of the Port Huron & Northwestern R. Co., alleging that such purchase is not authorized by law; that it would be *ultra vires*; that it would involve a very large expenditure of money, inasmuch as the Port Huron & Northwestern R. Co. is a narrow-gauge road, in bad condition, and would require heavy outlays to render it of any practical benefit to the purchasers, and that such outlays and expenditure would be drawn from earnings and income of the Flint & Pere Marquette R. Co., which, under article 4 of its charter, should be applied to dividends; and, generally, that the purchase would deplete the revenues of the latter road, seriously affect their rights, and that they should, if it is legal, have a voice and vote on the question of such purchase. The Port Huron & Northwestern R. Co. filed an answer, saying, in substance, that negotiations were pending for the purchase or acquisition of its road by the Flint & Pere Marquette Co.; that the method of effecting that would be such as would be legal under the laws of Michigan, without explaining what method was proposed. The Flint & Pere Marquette Co. demurred, and thereby admitted the allegations of the bill. On the argument questions were raised as to the character of this suit, which sought, in addition to restraining said purchase, the same general relief sought in and by the first case. The court is of the opinion that the Port Huron & Northwestern R. Co. was neither a necessary or proper party to the litigation or questions involved in either of these suits; that this last bill was properly a supplemental bill. It was filed without leave, as required by equity rule 57; but it was filed November 28, 1887, for the purpose of enjoining a transaction which was about to occur, as alleged, on November 30, 1887, so that the provisions of rule 57 could not be conformed to. This bill will be dismissed as to the Port Huron & Northwestern R.

Co., with costs. The court will now order it to stand, and to be treated as a supplemental bill in the original suit, as may be done under the authorities. *Story, Eq. Pl. §§ 882-905; Neale v. Neales, 9 Wall. 1; and Graffam v. Burgess, 117 U. S. 195.*

The Flint & Pere Marquette R. Co. admits the allegations of this supplemental bill by its demurrer, and thus presents the legal question whether, under the laws of Michigan, it can purchase the stock and franchises of the Port Huron & Northwestern R. Co.; and, if so, can it, as against the common or unpreferred stockholders, apply its income, either in paying for the interests purchased, or in improving and altering the property so acquired? It is now well settled that the proposed purchase of the stock, property, and franchises of the Port Huron & Northwestern R. Co., as alleged in the supplemental bill, whereby the latter company would be absorbed by the purchasing company, cannot be legally made in the absence of lawful authority from the state of Michigan. *Pearce v. Railroad Co., 21 How. 442; Thomas v. Railroad Co., 101 U. S. 71; Branch v. Jesup, 106 U. S. 478; Railroad Co. v. Railroad, 118 U. S. 290.* Do the laws of Michigan authorize or sanction such purchase? Under the general railroad law of the state (act 1873, § 29) railroad companies are allowed to consolidate upon certain terms, when they form continuous or connecting lines. This contemplates the formation of a new corporation; and the assent of the stockholders in each company, or a majority thereof, is requisite to the consolidation. This statute is not applicable here. The bill charges, not a purpose to consolidate with the Port Huron & Northwestern R. Co., but to purchase the latter's stock, property, and franchises, and to use the same as part and parcel of the purchasing company, and thus to bring the acquisition within the operation of its own charter. The consolidation statute does not authorize one company thus to acquire and absorb another. By section 28 of the general railroad laws of 1873 (1 How. St. § 3342) it is provided that one railroad corporation may subscribe to the capital stock of any other company organized under said act, with the consent of the latter; and by the acts of 1869 (1 How. St. § 3413) and 1873 (1 How. St. § 3403) one railroad company is authorized to aid another having an unfinished road, and to make running arrangements; and, where the lines are connected, may enter into arrangements for their common benefit, "consistent with and calculated to promote the objects for which they were [respectively] created." It is manifest, without discussion, that these statutory provisions do not authorize one railway corporation to acquire the stock and franchises of another completed company, with the intention of exercising

Authority to
purchase Port
Huron and N.
R. Co.

the franchises of the latter, which is the case presented by the supplemental bill. Again, the complainants, being now entitled to admission into the Flint & Pere Marquette R. Co., as common stockholders, under and according to the provisions of its charter, and it being alleged and admitted by the demurrer that their interests and rights will be injuriously affected by the proposed purchase and acquisition of the Port Huron & Northwestern R. Co., they have the right to invoke the interposition of this court in preventing the consummation of the transaction until they have an opportunity of expressing their assent or dissent thereto: for, if the transaction can be lawfully made in any way, it would still be an enlargement and extension of the corporate purposes and objects of the company, as defined in its charter, as to which they have the right to express their assent or dissent. The proper time to do this is before, and not after, the transaction is completed. *Black v. Canal Co.*, 24 N. J. Eq. 455.

In the opinion of the court the preliminary injunction should be granted on the case made out by the supplemental bill, admitted by the demurrer, and disclosed in the course heretofore pursued by the company's management towards the common stockholders. The demurrer of defendants is overruled, and the injunction is accordingly ordered, with leave at any time hereafter, when the common stockholders shall have been admitted into their rights as ordered and decreed in the main case, to move for a modification or dissolution of the same. The supplemental bill will be dismissed as to the Port Huron & Northwestern R. Co., with costs to be taxed against complainants. The remaining costs in both cases will be taxed against the Flint & Pere Marquette R. Co.

Relative Rights of Preferred and Common Stockholders—Dividends.—See *Hazeltine v. Belfast & M. L. R. Co.*, 30 Am. & Eng. R. R. Cas. 528; s. c., 23 Ib. 736, note, 743; *Elkins v. Camden & A. R. Co.*, 9 Ib. 639, note, 646; *State v. Cheraw, etc., R. Co.*, 9 Ib. 631; *Dent v. London T. Co.*, 1 Ib. 592; *Chaffee v. Rutland R. Co.*, 16 Ib. 408, note, 435; *Nickals v. New York, etc., R. Co.*, 13 Ib. 139; *Cotting v. New York, etc., R. Co.*, 29 Ib. 371.

THOMAS *et al.*

v.

PEORIA AND R. I. R. CO. *et al.*

(U. S. Circuit Court, N. D. Ill., August 29, 1888)

Railway Mortgages—Foreclosure—Lease of Cars—Rent.—Although in proceedings to foreclose a railroad mortgage, and to adjust the claims of intervening creditors, leases of cars by a car company to the mortgagor company, both of which companies were dominated and controlled by substantially the same persons, the leases may be rejected as a basis for ascertaining the amount due the car company for the use of the cars, or the nature of the obligations assumed by the railroad company, or by the receiver appointed, pending such foreclosure; yet the lessor company is entitled to such reasonable rent as it could obtain in the open market for similar cars to be used in the same manner.

Same—Receivership—Charging Income with Rent of Cars.—Although when a receiver is appointed pending foreclosure of a railroad mortgage, and both before and during such receivership improvements and equipments are made from current receipts, the income during the receivership may be charged with the claim for rent of cars, and if that is insufficient, the claim may be charged upon the proceeds of the property; yet the proceeds will not, in the absence of special circumstances, be for such rent and for claims for lease of cars, etc., which accrued more than six months prior to the appointment of the receiver.

Same—Repairs to Cars—Laches.—In the absence of sufficient evidence that the cars needed repairs, no claim having been made upon the receiver appointed pending foreclosure, a claim for such repairs by the lessor who intervened, made in an amended petition filed three years after the surrender of the cars, will be rejected.

Same—When Claim Allowed.—Where a receiver appointed pending foreclosure agrees to keep cars leased for use on the road in good repair, such claim will be allowed.

Same—Lease of Cars Pending Foreclosure—Interests Under.—A lease of cars pending foreclosure of a railroad mortgage, although valid until disaffirmed by the court, is not an instrument in writing such as entitles the lessor to interest under III. Rev. Stat. 1885, p. 1356.

Same—Claiming more Rent than Due—Effect.—Although the lessor still claims a larger sum than that to which he is equitably entitled, yet if he is refused payment of any amount approaching that which is due him, this constitutes an unreasonable and vexatious delay, which will justify the allowance of interest and the aggregate amount due from the date of the filing of the master's report.

IN EQUITY. On the claim of the Western Car Co., an intervening creditor in the foreclosure of a railroad mortgage.

The original cause, in which the Western Car Co. intervened, was a proceeding to foreclose a mortgage executed by the Peoria & Rock Island R. Co. to secure its first mortgage bonds

to the amount of \$1,500,000. The original bill was filed in October, 1874, and on February 1, 1875, J. R. Hilliard was appointed receiver of the railway company. He remained in control, and operated the railroad until after its sale under a final decree of foreclosure, passed January 11, 1877. At that sale R. R. Cabell became the purchaser. On the 17th of September, 1877, the sale was confirmed; the purchaser being allowed to pay into court, upon his bid, all the first mortgage bonds of the railway company held by him. On December 11, 1877, a further order was entered in the original cause, reciting, among other things, the assignment by Cabell to the Rock Island & Peoria R. Co. of his interest as purchaser, and ordering the master to execute and deliver to that company a deed of conveyance of the property so purchased, and the receiver to deliver to it possession. By said order it was further provided that Cabell should execute to certain sureties therein named a penal bond in the sum of \$100,000, payable to the clerk of the court, for the use of whoever should be thereto entitled, and conditioned to pay into court such sum or sums of money as the court should thereafter direct. One of the purposes of that bond was to secure the payment of any sums that should be awarded in the cause to the Western Car Co. A bond in the amount named was executed as required. It should be stated in this connection that the decree of sale provided that the residue of the proceeds of the sale of the property, after paying certain specified costs and debts, should be applied under the direction of the court—First, to the payment of all remaining claims of intervening creditors, as they shall be allowed by the court; second, to the payment of the bonds and coupons secured by the mortgage, paying the same in full if the residue was sufficient for that purpose; otherwise, paying *pro rata* upon such bonds and coupons. The report made by the master, Henry W. Bishop, upon the claim of the Western Car Co. is as follows:

To the Honorable, the Judges of said Court: These intervening petitions allege that on March 1, 1872, the defendant company and the petitioner made a contract in writing, by which the car company leased to the defendant company ninety cars, seventy of them box cars, numbered from 151 to 220, inclusive, and twenty stock cars, numbered from 51 to 71, inclusive, for a term of five years, at a rental for each car of \$20 per month, from the date of the delivery of said car; the contract also providing that, if any of them were disabled or destroyed, the company would immediately replace them with other cars of like quality and value, which should become the property of the car company, and also to maintain and keep said ninety cars, during the term of said contract and its renewals, in good repair and safe, and in

proper running order, and at its own expense to furnish all the materials, and to make all the renewals of said cars from time to time, as they should be needed, and to put and keep them in proper condition for regular use, and, at the termination of said contract or renewals, to return said cars to the Western Car Co. in proper condition and repair for their immediate and active use. That said company furnished said cars to said railway company about the date of said contract, and that the railway company received and used them, by reason of which they are entitled to the rent provided in said contract. That on October 1, 1873, another contract of a similar character was made between the parties, by which the petitioner rented to the defendant company 150 other cars, being fifty box-cars, numbered from 220 to 270, inclusive, and 100 White Line cars, numbered from 9401 to 9500, inclusive. That said second lease was also for the term of five years, and also provided for the payment of rent at \$20 per month for each car, and with the same provisions in regard to the destroyed or disabled cars, keeping the cars in repair, and returning them in good repair, at the end of the lease. That the cars referred to were used by the defendant company until its road went into the hands of the receiver, appointed by the court, February 1, 1875. That the rental was, by stipulation of July 1, 1874, reduced to \$15 per month, and continued until the receiver's appointment, leaving at that time a balance of \$35,106.48. That two of said cars were destroyed, which were of the value of \$1500, and not replaced; and by an amended supplemental petition, filed October 16, 1877, it was claimed that there was due petitioner also the sum of \$4000 for repairs put upon 100 White Line cars. Interest is claimed upon said sums since the dates they were respectively payable by the terms of the contract. This is, in substance, the claim of petitioner prior to the appointment of the receiver.

"The petitions further allege that a contract in writing was made on the 11th day of June, 1875, between the petitioner and the receiver, by which the petitioner rented to said receiver 138 cars for the term of one year, with the privilege of renewal, at a rental of \$10 per month for each car, keeping them in good repair for use on said road. That, under such contract, the receiver took possession of and used said cars until they were returned in bad order, with the exception of four, which were not returned at all; for the payment of which claim is made. That subsequently, in March, 1875, the receiver, with the consent of the petitioner, received 56 cars from the Chicago & Northwestern R. Co., using the same at a rental per mile until December 1, 1875, when it is claimed, it was agreed between the parties that the use of the same should be retained by said receiver upon the same terms as provided in the contract

last referred to, until the decision of the court in the cause in which they had been replevied by the petitioner. That said receiver used the same, paying no rental therefor, until rent had accrued to petitioner amounting to \$15,281.34, together with the sum of \$3500, which, it was alleged, was the expense of putting them in good condition, besides the loss of rental or use during their repair. Interest is also claimed by said petitioner on each of said sums from the dates when payable by the terms of said contracts. These claims are, therefore, those which are alleged to have accrued prior to the six months immediately preceding the receivership, and those arising during the six months before the appointment of the receiver and during the receivership; and statements of account, made out in detail, are exhibited in connection with the petitions, showing the way in which they have arisen, and the basis upon which the account is stated. It is insisted upon the part of the respondent that in stating this account the rental contracts upon which the petitioner bases that portion of its claim which accrued to it from the railway company prior to the receivership, should be disregarded, because fraudulent and void: the officers and persons controlling the railway company having been at the same time interested in, and having the management and control of, the car company; and that the compensation for the use of said cars during the entire period for which the fund or the receiver is liable should be determined by its fair value, as shown by the testimony. This question seems to me to be unimportant in view of what I understand to be the settled practice of the court in cases of this kind, which practice I have endeavored to follow in stating this account by allowing to the petitioners such payments as they are shown to be reasonably entitled to by the testimony.

"The defence interposed to all of the claims set out in the petition is of the same general character, and I do not consider it necessary to refer to it here more specifically. It has been the practice of the court in cases of this character to allow against the fund or the receiver claims of this kind, established by the testimony as reasonable and just, which have accrued during the period of six months prior to the appointment of the receiver, and during the receivership, independent of any contracts which may have previously existed, unless such contracts have in some way been recognized and adopted by the court; and in stating this account, I have endeavored to follow this practice. It is insisted upon the part of the petitioner that, as to a portion of the rental term, there was such a recognition by the court of the contract relation between the parties as would charge the respondent with the payment of rentals and repairs, as provided therein. I think the testimony does not justify this belief, and I am unable to find any order of the court authorizing the receiver to enter

into any contract whatever for the rental of cars upon stipulated terms. In stating this account, I have ignored that portion of it which accrued before August 1, 1874, six months prior to the appointment of a receiver, at which time it was claimed that there was due and unpaid for rentals the sum of \$32,400, upon the basis of the alleged contract price, or \$26,162.99 after a credit of \$6,237.01 for money received by petitioner for rent of the White Line cars. It is claimed by the petitioner that this sum should be applied on account of rentals due and accrued more than six months prior to the receivership. It appears, however, from the testimony, that this money was realized from the rental of the cars during the period of the three months immediately prior to the receivership, and I have therefore applied it as a credit in favor of the respondent on the account which accrued within the six months prior to the receivership. It is insisted, also, that upon the balance for rentals, as well as for repairs and renewals, interest should be credited at the rate of six per cent per annum, and this has been done in every instance in the accounts presented by the petitioner. I have, however, disregarded this item, because I do not think it should be allowed against a receiver possessing no authority, except under the direction of the court, either to agree upon the amount due from time to time, or to pay the same, except under its direction, or in a case where the amount in controversy is still undetermined, as in this instance.

"Upon the basis of what has already been stated, I find that for the period of six months prior to the receivership the respondents are liable for the rental of 240 cars at a stipulated price of \$15 per month, being the months of August, September, October, November, and December, 1874, and January, 1875; amounting to \$21,600. The payments which are shown to have been made upon this account amount to the sum of \$13,300, leaving a balance of \$8,300 due for the six months prior to the receivership. From the balance should be deducted the item of \$6,237.01, earned by the White Line cars during the three months immediately preceding the receivership, and paid to the petitioner by the receiver, leaving due as the balance of claim for rental that accrued within six months preceding the appointment of a receiver, the sum of \$2,062.99. The items which have been employed in making up this account are furnished in the statement of account between the petitioner and the railroad company, shown by Exhibit F to Whittredge's deposition, and also stated by counsel for petitioner in their argument; and from McKee's deposition in the demand which was made by the car company for payment of the sum claimed to be due, it appears there was included no charge for interest. The rental per month is also established by the testimony to

have been a fair rental at that time. It is claimed by petitioner that there should be added to this sum due for the rental of these cars during the six months prior to the receivership the following items: Value of two lost cars, \$850.00; sum expended in repairs of White Line cars, \$4,003.86; and loss of rental during time of such repairs, \$1,000.00. The testimony shows that prior to the receivership five cars were destroyed and lost; and four of these, I think, are shown to have been lost more than six months prior to the receivership. I therefore have rejected the claims of petitioner for lost cars. It appears from the evidence that the receiver, upon his appointment, returned the 100 White Line cars, after which there was expended by the petitioners upon them for repairs the sum of \$4,003.86; and it is claimed that this expense is chargeable against the fund in court, as well as the sum of \$1,000.00 for loss of rental during the making of these repairs. I have disallowed both of these claims, which makes the total amount due to petitioner, exclusive of interest, and after allowing all credits prior to February 1, 1875, when the receiver was appointed, the sum of \$2,062.99. The claim of \$4,003.86 for money expended in repairs on 100 White Line cars is involved in so much uncertainty by the testimony that I have found it exceedingly difficult to deal with it. The receiver swears that no claim was ever made upon him for repairs upon these cars, and there is no testimony offered upon the part of the petitioner controverting it, and there is very little evidence, if any, tending to show that their condition required repairs when the receiver delivered them over to the petitioner, in 1875. In the original petition, filed November 11, 1876, nearly two years after their surrender, and, according to the testimony of McKee, nearly a year after the repairs were made, no claim was made for the payment of this charge neither was any claim made until the amended and supplemental petition was filed, October 16, 1877, which was nearly three years after the surrender of the cars. In view of these facts, and the effect of the testimony in respect to the condition of the cars at the time of their surrender, I am unable to determine what, if any, proportion of these repairs should be borne by the respondent, and am therefore obliged to disregard this item of charge as not having been established by the testimony.

"The other claim of petitioner is against the receivership, and for rentals which accrued after February 1, 1875, and for cash paid for repairs of cars which were returned damaged, and for lost cars, and for interest upon all the overdue claims. It appears from the testimony that, upon the appointment of the receiver, he returned the 100 White Line cars, and retained in his possession the remainder, claimed by the petitioner to have been 138 in number, but, as I find from the testimony, 135 only,

although the auditor of the respondent treated the number as 138. The testimony shows, I think, however, that the remaining five cars were in some way destroyed or lost; that through some arrangement the receiver used these cars during February and March, 1875, at a rental of \$12 each per month, for which time payments were made at that rate, and at the rate of \$10 per month each for April, 1875, which was also paid, with the understanding that he should pay a rental of \$10 per car per month thereafter. The statement of account which is produced by the petitioner adopts these rates of rental, giving the payments that were made upon account, and charging rental during the time of their repair. A claim is also made for keeping these 135 cars in repair, and a statement of this is also exhibited in detail in connection with the petitioner's demand.

"The respondent denies that it is liable for the payment of these claims, because no engagement of that character was entered into between it and the petitioner, and, if liable at all, not to the extent demanded, for the reasons that the charges are in many instances excessive, having been unnecessarily incurred, and that a large number of the cars required were not received by it in good order. It is insisted by the respondent that it was never required by the terms of its engagement to return these cars in any better condition than they were when he received them, and that any expenses that were incurred by the petitioner in putting them into condition for releasing are not properly chargeable against respondent; that the repairs put upon said cars were excessive, unnecessary, and not suited to the character of the cars, amounting practically to renewals, and adapted to a better use than was intended for them in their original construction. I have found it difficult to deal with this branch of the case, for the reason that, while it appears that the bills which have been presented for these repairs were actually paid by the petitioner, it is also evident that in many instances these repairs were extravagantly conducted, and that in many respects they were rendered necessary by their condition before they came into the hands of the receiver: and there is much testimony in the case showing this to have been the fact. It is also apparent from the testimony that in many cases cars were practically rebuilt and renewed. Upon a very careful examination of all of the testimony bearing upon this branch of petitioner's claim, I find it impossible to separate the items of this account in such a way as to equitably charge this respondent with such portion of the repairs as he should be called upon to pay upon the basis of the claim of the petitioner, although in my estimation the effect of the testimony is to show that a credit, at least to some extent, of the amount charged by the petitioner upon this item, should be applied to the reduction of

this claim. A claim is also made for the value of four of the 138 cars which were never returned, amounting to \$1800, and credit afterwards given by the return of one of them. I have already found that of the 138 cars but 135 went into the hands of the receiver, and I have therefore disregarded this claim. In addition to this, it is claimed that the receiver came into the possession of fifty-six box cars, which had been replevied from the Chicago & Northwestern R. Co., and which, by arrangement, were used by the receiver until they were finally surrendered. For this use a mileage rent has been charged from March, 1875, to December 1, 1875, as appears by statement made by the auditor of the road, which rental, less certain conceded debits in the receiver's favor, amounts to the sum of \$391.34; and that thereafter, from December 1, 1875, to the time they were finally surrendered, for their use and for the time they were detained for repairs a charge of \$10 per month per car was made, amounting to the sum of \$13,122.23. For this last term it is denied by the respondent that there was any written contract finally entered into. I think it is shown by the testimony that an arrangement of this character was agreed upon between the parties, and reduced to writing, though perhaps it was not finally consummated or delivered, and that, in any event, the cars were used during this time, and \$10 per month per car was a reasonable compensation for their use. A claim is also made by the petitioner for \$5650 expended in repairing these fifty-six cars after their surrender to it by the receiver. It appears from the testimony that these cars were received in bad condition, after having been used for two or three years by the railroad, from which they appear to have been taken by the receiver, partly, at least, upon the suggestion and for the accommodation of the petitioner. It appears, however, that this sum was actually expended by the petitioner upon the cars; and, as I find it impossible from the testimony to determine to what extent the respondent is liable for the payment of these charges, I am unable to make what may be finally regarded as an equitable distribution of this liability, and am obliged to charge the respondent with the full amount of the payment shown to have been made on this account. Interest at the rate of six per cent is charged upon all of the balances in these accounts, and credits have been given for moneys paid from time to time upon them.

"In estimating the amount due petitioner upon these claims, I have, as in case of the claim for the term prior to the receivership, not taken into account the interest demand, but have wholly disregarded it as to both branches of the account; and upon this basis I find and report that there is due and owing to the petitioner for the rent of 135 cars from February 1, 1875, to April 1, 1875, at a rental of \$12 per month per car, which rental

I find from the testimony to have been a reasonable rental at that time, the sum of \$3240.00. For the rent of 135 cars from April 1, 1875, to the date of their return at the rate of \$10 per month, which I find from the testimony to have been a reasonable rental during this term, the sum of \$35,375.97. I find that during this period there was paid out for repairing cars by petitioner the sum of \$14,046.55; and during both of these terms the payments made on account by the receiver was the sum of \$29,808.00; leaving due petitioner the sum of \$22,854.52. I find also there is due a mileage rental for the fifty-six replevied cars from March, 1875, to December 1, 1875, \$391.34; and for rent of fifty five of these cars from December 1st to the date of their surrender at the rate of \$10 per month per car, which I find from the testimony to be a reasonable compensation for their use, the sum of \$12,857.32. That there is due for money expended for the repairs of fifty-five cars the sum of \$5650.52; leaving due and owing petitioner upon this second branch of account against the receiver, the sum of \$18,899.18; making a total due the petitioner for the term commencing with the appointment of the receiver, and extending over the entire term of the account with receiver, the total sum of \$41,753.70. I find the balance, therefore, due upon the claim of the petitioner for rentals and repairs and mileage, after deducting all credits, and the disallowance of interest, for the term beginning six months prior to the appointment of the receiver until the date of the surrender of the cars, respectively, the total sum of \$43,816.69, for the payment of which I recommend that a decree be entered.

"Upon this reference I have been attended by the solicitors of the respective parties, and in the examination of the matters referred to me I have had the benefit of their full and careful presentation of the case. If, however, the court should be of the opinion that the respondent is liable for the rental of cars, on the terms of the rental contracts, that accrued and remained unpaid when the six months prior to the receivership began, and for the interest upon the balances stated during that time, and for the repairs claimed to have been made during that time, and for interest upon balances for repairs claimed during that time, then there would be due and owing petitioner for rentals prior to the receivership."

Hopkins & Hayward and *John M. Butler* for Western Car Co.

Chas. M. Osborne and *Saml. A. Lynde* for the railroad company.

HARLAN, J.—The court cannot, consistently with any sound principle of equity or of public policy, recognize the contracts

between the Western Car Co. and the Peoria & Rock Island R. Co., one dated March 1, 1872, and the other dated October 1, 1873, as the basis of accounting between the parties to this cause. The officers and individuals dominating the car company were, substantially, the same officers and individuals that dominated the railroad company. For every purpose of business the masters of the lessor company were also masters of the lessee company. Those who contrived and directed the making of the leases in question in behalf of the car company must, under the circumstances disclosed by the record, be deemed to have contracted simply with themselves in reference to the monthly rental of its cars, and the terms upon which they were to be used by the railroad company. When it is sought to use these leases as a means by which to reach the proceeds arising from the use and sale of the property of the lessee company, those who have an interest in such proceeds, as well as the corporation itself, are at liberty, for their own protection, to question their validity, or to insist that they shall not be made the basis of claims upon these proceeds. It would be extraordinary if the holders of the mortgage bonds of the railroad company should be denied the right to show that the obligation imposed by these leases to replace such of the leased cars as were disabled or destroyed with others of like quality and value; to maintain and keep all of them in good repair and in safe and proper running order; to furnish all the materials, and make all the renewals needed from time to time; to put and keep the cars in proper condition for regular use; and, at the termination of the lease, to return the cars to the lessor company "in proper condition and repair for immediate and active use,"—was, in effect, if not in fact, imposed upon the railroad company by those who, although holding stock in that corporation, were nevertheless interested in behalf of the lessor company, in exacting the highest rentals for its cars, and in attaching to their use such conditions as were most favorable to it. The court cannot close its eyes to the fact that those who assumed to bind the railroad company by these leases were directly interested in the profits to accrue therefrom to the lessor company. The rule governing such transactions is not to be disregarded or enforced according as the court may happen to be able to ascertain the exact amount, in dollars and cents, which may be realized by an agent who undertakes to serve, in the same business, two principals, whose respective interests are antagonistic. Such an agent cannot make a contract for both principals that a court is bound to enforce against the wishes of the objecting principal, or other parties in interest. The present case is brought by the evidence within the principle announced in *Wardell v. Railroad Co.*, 103

Contract with
Car Co. not
recognized as
basis of ac-
counting.

U. S. 658 ; s. c., 1 Am. & Eng. R. R. Cas. 427. It was there said : "The directors of corporations cannot enter into or authorize contracts in behalf of those for whom they are appointed to act, and then personally participate in its benefits. Hence all arrangements by directors of a railroad company to secure an undue advantage to themselves at its expense, by the formation of a new company as auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned, whenever properly brought before the courts for consideration."

See also *Thomas v. Railroad Co.*, 109 U. S. 522 ; s. c., 16 Am. & Eng. R. R. Cas. 557 ; *Wright v. Railway Co.*, 117 U. S. 72, 94 ; s. c., 24 Am. & Eng. R. R. Cas. 312.

Practically, this is a suit by the Western Car Co. upon a contract that it made, by its managers and controllers, not only for itself, but for the other contracting party, the railroad corporation. It is none the less so because those managers and controllers also had an interest in the lessee corporation. The leases referred to must therefore be put aside as a basis for ascertaining either the amount due the Western Car Co., or the nature of the obligations assumed by the railroad company or by the receiver on account of their having used the cars in question. But it does not follow that the railroad company and the receiver were entitled to use the property of the car company without making some compensation. While the leases of 1872 and 1873 cannot be made the basis of the accounting between the parties, the car company is nevertheless entitled to be reasonably compensated for the use of its cars ; such compensation however, to be fixed without reference to, and wholly apart from, the leases. What is to be deemed such reasonable compensation ? Or, rather, what are the elements in the inquiry as to reasonableness ? On behalf of the railroad company and the bondholders it is contended mainly upon the authority of *Thomas v. Railroad Co.*, that the true test is the value directly accruing to the railroad company from the use of the cars. If by this it is meant that the court must ascertain how much the railroad company in fact realized from the use of the cars, taking its whole business, so far as these cars were used, into account, that proposition cannot be sustained. The case cited hardly supports such a rule. All that was there said was that, in fixing the value of the labor and materials for which compensation was asked, the prices named in the contract there in

Railroad and receiver not entitled to property without compensation.

question should not, in view of its illegality, govern the court; that compensation should not be given for labor and materials that were of no value whatever to the railroad company. If the labor and materials were of real value, that is, if they were needed or required by the business or necessities of the company, then they were to be paid for; the amount to be ascertained in some mode consistent with law. Such I understand to be the extent to which the Thomas Case goes. The court did not mean, by anything there said, to exclude evidence as to what was usually allowed for such labor and materials at that place, or in the locality where the labor was performed and the materials furnished. In the present case it is manifest that the railroad company actually needed the cars furnished by the car company, and that they were of real value to it. Upon the question of reasonableness there is—and, in the nature of things, there must be—serious difficulty. The respondents call attention to the testimony relating to the stock dividends made by the car company, and insist upon such dividends made by the car company, and insist upon such dividends as furnishing the proper test of rental value. But this test, while not to be disregarded altogether, is too uncertain, and would mislead; for the profits of the car company varied in different years. They also refer to the actual cost of each car, and upon that basis contend that the rent claimed by the car company is an exorbitant return for the capital at risk. This is a fair argument; but there are other considerations to be taken into account. The system of "mileage rates," as adopted between other railroad and car companies; the class of railroad companies among which that system should obtain; the rental paid, in open market, for similar cars furnished to other railroad companies by the Western Car Co., or by other car companies; the quality of the particular cars in question, as compared with cars made by other car companies,—these are all proper elements in the inquiry as to reasonableness of compensation. Recognizing it as impossible to lay down a rule that would be applicable in every case, it may be said, generally, that a fair compensation for the use of these cars during the several periods in question would be such amount as similar cars—to be used in the same manner, and upon similar roads—would commonly rent for in the open market. If the railroad company required the cars for ordinary or proper business purposes, as I think it did, it should be charged with such rental as, in the state of the market at the time, was fair and just under all the circumstances.

There are other matters of a general nature to which reference must be made before we come to consider the details of the accounting between the parties as set forth in the master's report. Under what circumstances, and to what extent, may

the court charge the income of the railroad property in the hands of its receiver with the liabilities incurred by the railroad company, in respect to petitioner's cars, prior to the appointment of such receiver? Without stopping to discuss this question as if it were for the first time presented, it is sufficient to say that the following propositions are sustained by the decisions of the supreme court of the United States, viz.: (1) When "a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment, from the income during the receivership, of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable." (2) As it frequently happens, when a railroad company becomes pecuniarily embarrassed, that "debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided," and as in this way "the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt," the presumption is that every railroad mortgagee, "in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income." Consequently "the income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements." (3) If anything is taken from the current debt fund, and put into that which belongs to the mortgage creditors, the court may require, as a condition of an order to take possession of the mortgage property, and hold the future income for the mortgagees, that "what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees;" this, notwithstanding the mortgage, may, in terms, give a lien upon the profits and income; for, "until possession of the mortgaged premises is actually taken, or something equivalent done, the whole earnings belong to the company, and are subject to its control." (4) So, also, if no order is made, when a receiver is appointed, that will, in terms, save the rights of creditors furnishing supplies, equipment, labor, etc., if it appear, in the progress of the cause, "that bonded interest has been

Charging income with liabilities incurred in respect to cars—Doctrine of supreme court.

paid, additional equipment provided, or lasting and valuable improvements made, out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business;" this "because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and, if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its hands as, if practicable, to restore the parties to their original equitable rights." (5) That "while ordinarily this power is confined to the appropriation of the income of the receivership, and the proceeds of mortgaged assets that have been taken from the company, cases may arise that will require the use of the proceeds of the sale of the mortgaged property in the same way;" as when, before the appointment of the receiver, or in the administration of the cause, income applicable to the payment of old debts for current expenses is taken and used "to make permanent improvements in the fixed property or to buy additional equipment." *Fosdick v. Schall* 99 U. S. 235, 252-254; *Miltenberger v. Railway Co.*, 106 U. S. 286, 311, 312; s. c., 12 Am. & Eng. R. R. Cas. 464; *Trust Co. v. Souther*, 107 U. S. 591; s. c., 11 Am. & Eng. R. R. Cas. 707; *Trust Co. v. Railway Co.*, 117 U. S. 434, 457; s. c., 25 Am. & Eng. R. R. Cas. 560; *Burnham v. Bowen*, 111 U. S. 776; s. c., 17 Am. & Eng. R. R. Cas. 308; *Trust Co. v. Morrison*, 125 U. S. 591; *Railroad Co. v. Cowdrey*, 11 Wall. 459; *Gilman v. Telegraph Co.*, 91 U. S. 603; *Bridge Co. v. Heidelberg*, 94 U. S. 798; *Sage v. Railroad Co.*, 125 U. S. 361; s. c., 35 Am. & Eng. R. R. Cas. 40; *Trust Co. v. Shepherd*, 127 U. S. 494. In *Miltenberger v. Railway Co.*, and, again in *Trust Co. v. Railroad Co.*, the court said that it could not be affirmed "that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the *corpus* of the property, under the order of the court, with a priority of lien;" that while the discretion to do so should be exercised with great care, and while the payment of such debts stands *prima facie*, on a different basis from the payment of claims arising under the receivership, the former may be brought, by special circumstances, within the principle governing the allowance of the latter.

I come now to the examination of the accounts rendered by

the car company for the use of its cars. The money out of which it seeks payment of its several demands being either the proceeds of the sale of the mortgaged property, or income derived from the property during the receivership, the petitioner's claims for use of cars, etc., accruing prior to the period of six months immediately preceding the appointment of the receiver, are passed by without any expression of opinion as to their correctness. The general rule that has obtained in this circuit for many years, though not fully or expressly formulated in any published decision, has been not to charge the income of mortgaged property accruing during a receivership, or the proceeds of the sale of such property with general debts for labor, supplies, and equipment, back of the six months immediately preceding the appointment of a receiver. While the court has not, perhaps, committed itself against applying a different and more liberal rule, when the special circumstances or equities of the case demand such a course, the general rule is as just stated; and I am unwilling in this case, and at this late day, to depart from it. Besides, I am of opinion that, under the circumstances that usually attend the administration of railroad property by the courts, through receivers, the rule stated is a wise and salutary one. It would not do to charge the income of mortgaged railroad property, managed by a receiver, or the property itself, with every debt incurred in all its previous history for labor, supplies, or equipment. As was said in *Fosdick v. Schall*, the business of all railroad companies is, to a greater or less extent, done on credit. Those who perform labor, or furnish supplies and equipment, usually expect and contract to be paid within a reasonable time; and they do not ordinarily perform labor, or furnish supplies or equipment, after the railroad company has failed to pay within such time for what has been previously done or furnished. Expenses incurred within such reasonable time constitute what are called "current expenses," which ought, if possible, to be paid out of the receipts during the same period. When, therefore, debts of that character remain unsettled, or are not put in suit, for such a time as would be deemed unreasonable, it may be fairly presumed that the creditors have ceased to look to current receipts for payment, and have accepted the position of general creditors who, as such, would have no claim for indemnity upon any special part of the income. Upon these grounds, substantially, rests the rule that recognizes the right of the court to charge the income earned during the receivership with obligations for labor, supplies, and equipment, contracted by the railroad company during the six months immediately preceding the receivership. Such debts constitute operating expenses incurred to the end that mortgage bondholders might

Demands accruing prior to six months preceding appointment of receiver.

be protected, and that the company might be kept upon its feet, and subserve the public purpose for which it was established, namely, the maintenance of a highway for the convenience of the people. I will also say that the six-months rule which this court has heretofore recognized, when applied in cases arising since July 1, 1872, finds support, by analogy, in the statute of Illinois of that date, providing that fuel, ties, materials, supplies, or any other articles or things furnished to and necessary for the construction, maintenance, operation, or repair of a railroad, by contract with a railroad corporation, or work or labor performed for such construction, maintenance, or repair by like contract, shall be paid for as part of the current expenses of the road, and a lien to secure the same is given upon "all the property, real, personal, and mixed, of said railroad corporation, as against such railroad, and as against all mortgages or other liens which shall accrue after the commencement of the delivery of such articles, or the commencement of said work or labor; provided, suit shall be commenced within six months after such contractor or laborer shall have completed his contract with said railroad corporation, or after such labor shall have been performed or materials furnished." It may be added that the grounds upon which the court may charge the income of mortgaged railroad property, earned during the receivership, with debts for labor, supplies, and equipment, received prior to the appointment of the receiver, are so fully stated in some of the cases cited—particularly in *Fosdick v. Schall*—that further discussion of them is unnecessary. But I will say that the six-months rule was observed by me at the circuit, when disposing of the case of *Trust Co. v. Railway Co.*, and the final decree, so far as it rested upon that rule, was not disturbed by the supreme court.

What, then, is the amount due the petitioner for the use of its cars during the six months immediately preceding the appointment of the receiver; that is, from August 1, 1874, to February 1, 1875? The master finds the respondents liable for the use, during that period, of 240 cars at \$15 per month, in the sum of \$21,600; that on this account there was paid \$13,300, leaving a balance of \$8300. From the latter sum he deducts \$6237.01, earned by the White Line cars, and paid over to the car company, leaving a balance of \$2062.99. The deduction of the \$6237.01 was right, because that sum was earned by the White Line cars during the six months in question. But I am of opinion that the deduction of \$13,300 is too large by \$6100. In estimating the payments or rental subsequent to August 1, 1874, and prior to February 1, 1875, the master included the following items in petitioner's account: August 11, 1874, \$2500; August 22, \$3600; September 22, \$3600; and October 2, \$3600.

Examination
of accounts—
Amounts due
for use of cars.

I am satisfied that the items of \$2500, August 11th, and \$3600, August 22d, aggregating \$6100, are for rent that accrued prior to August 1, 1874; consequently, instead of \$13,300 being deducted from \$21,600, only \$7200 should have been deducted; making a balance of \$8162.99, instead of \$2062.96, under this head. There is a further dispute between the parties upon this branch of the case; the petitioner contending that allowance should be made in its favor for these additional amounts: Value of two lost cars, \$850; repairs of White Line cars, \$4003.86; loss of rental during the period of such repairs, \$1000. The item as to the two lost cars must be rejected because, according to the weight of the evidence, they were lost prior to the six months in question. The remaining items of \$4003.86 and \$1000 must also be rejected for the reasons, if there were no other, that have been assigned by the master. It results that the amount due the car company, independent of any question of interest, for the period of six months just preceding the receivership, is \$8162.99.

This brings us to the examination of the claims for the use of cars during the receivership. Upon the appointment of the receiver he retained the 100 White Line cars; but a dispute exists as to whether the number of other cars retained by him was 138 or 135. The master proceeds upon the theory that he received, and had in use, only 135 cars; five out of the original 240 cars, other than the White Line cars, having been "in some way destroyed or lost." The proof does show the loss of the two heretofore referred to, but it does not sufficiently appear that the others were destroyed. The remaining three may have been lost during the receivership. If so, the receiver was bound to account for them. Giving due weight to all the evidence, it must be held that the receiver retained and used 138 of the original 240 cars. The rent of 138 cars from February 1, 1875, to April 1, 1875, at \$12 per month, a reasonable rental for that period, makes \$3312. I adopt that rental for the period stated, because it is reasonable, and because it is justified by the agreement between the car company and the receiver, under date of June 11, 1875, an agreement which was valid until disapproved by the court, and which, although not finally approved by the court, was so acted upon, with the knowledge of the parties, that neither side should now be permitted to question its validity. The rental from April 1, 1875, until the cars were returned, at \$10 per month, the rate specified in the receiver's agreement, aggregates \$36,163. These two sums, \$3312, and \$36,163, make \$39,475. From this last sum deduct the difference between the rent paid by the receiver, \$29,808, and the amount paid out during the same period by the petitioner for repairs, \$14,046.55, that is, \$15,761.45, and there will remain on account of the rental of

the cars from April 1, 1875, until they were returned (excluding the replevied cars), the sum of \$23,713.55.

The next item to be considered relates to the rental of the 56 replevied cars. The master reports, upon the basis of mileage rental from March 1, 1875, to December 1, 1875, the sum of \$391.34. That finding is approved. The main dispute here is as to the rental of the 56 cars from and after December 1, 1875, until they were formally surrendered. He allows \$10 per month, which makes an aggregate rental, after December 1, 1875, for these cars, of \$12,857.32. Upon this branch of the case I have had great difficulty. The evidence is seriously, and, in some respects, painfully conflicting. But I perceive no reason to question the entire fidelity to truth upon the part of witnesses. Looking at all the circumstances, I am of opinion that the indorsement by the receiver on the agreement of June 11, 1875, signed by him, that the 56 cars delivered to him, "being the cars replevied from the Chicago and Northwestern R. Co.," shall be retained by him "upon the same terms set forth" in the above agreement, "commencing on the 1st day of December, 1875," should turn the scale. And as the terms of the agreement of June 11, 1875, were not unreasonable, and as the indorsement was one that the receiver might reasonably have made in the interest of a fair administration of the property in his hands, I approve the finding of \$12,857.32 as the rental of the replevied cars while they were under the control of the receiver. The finding of \$5650.52 for repairs of the replevied cars, is also approved. The agreement of the receiver to keep those cars "in good repair for use on said road" justifies this allowance, if there were no other ground to sustain it.

It remains to consider the question of interest. The car company claims interest upon each item of its account for repairs, and each amount claimed as monthly rental for its cars. The demand for such interest is placed mainly upon the statute of Illinois, which provides that creditors shall be allowed to receive interest at 6 per centum per annum for all moneys after they become due on "any bond, bill, promissory note, or other instrument of writing," and "on money withheld by an unreasonable and vexatious delay of payment." Rev. St. Ill. 1845, p. 294; Id. 1874, p. 614; Id. 1881, p. 614; Id. 1885, p. 1356. In respect to interest on amounts due to the petitioner prior to the receiver's written agreement of June 11, 1875, the statute has no application; for, as already stated, the leases of 1872 and 1873 cannot be regarded valid instruments of writing, so as to be the basis of the accounting between the parties, or the foundation of a claim of interest under the local statute. Nor, assuming that statute to constitute a rule of decision in some cases for this court, do I think

Question of interest considered.

that the receiver's agreement of June 11, 1875, is such an instrument of writing as entitles the car company to claim interest as matter of absolute right under the statute. While that agreement or lease was valid as between the receiver and the car company until disaffirmed by the court that appointed the receiver, the car company would have had no legal ground of complaint, if the court had disapproved that agreement, and made such allowance for the use of the cars as was found to be just and reasonable, apart from the stipulations of the agreement. And while I have heretofore said that under all the circumstances of this case neither party ought to be heard to dispute the validity or terms of that agreement, it does not follow that it is a writing of the class described in the statute that has been cited. But I am of the opinion that there has been, as to a portion at least of the period covered by this long litigation, a vexatious and unreasonable delay in the payment of what was justly due to the petitioner, and that some interest should be allowed. It is difficult to fix the precise date from which interest should equitably be calculated. On one side, it is apparent that the car company has steadily claimed a much larger amount than was, in good conscience, due to it, thereby justifying the respondents in making defence, from which occurred, necessarily, some delay. On the other side, it is equally apparent that the respondents have steadily refused payment of anything like the amount that the petitioner was, in good conscience, entitled to demand. Under all the circumstances of the case, I have concluded that it is right to allow the petitioner interest upon the aggregate amount due to it from June 22, 1885, the date of the filing of the master's report, until its claims are paid. I am of opinion that the following amounts should be allowed the petitioner, viz.:

	Amounts allowed petitioner.
(1) Balance for use of cars during the six months preceding receivership.	\$ 8,162 99
(2) Balance of rent of 138 cars from February 1, '75, to April 1, '75, at \$12 per month, and from and after the last date at \$10 per month.	23,713 55
(3) Rent of replevied cars from March 1, '75 to December 1, '75, mileage basis.	391 34
(4) Rent of same from and after December 1, '75.	12,857 32
(5) Repairs of replevied cars.	5,650 32
	<hr/> \$50,775 52
Interest at 6 per cent on this sum from June 22, 1885, the date of filing of master's report, to September 1, 1888.	9,985 80
	<hr/> \$60,761 32

This amount increased by such interest as shall accrue on the above sum of \$50,775.52 after September 1, 1888, the petitioner

is entitled to have paid out of the income of the mortgaged property earned during the receivership, and, if that be insufficient, out of the proceeds of the property itself. The stipulations between the parties, the letter of Hilliard, of date January 13, 1877 (which is admitted to be correct in its statements), and the evidence in the cause showing the sums taken from current receipts that were applied, both before and during the receivership, for improvements, betterments, buildings, depots, machinery, and equipment, present a case that justifies the court, under the authorities cited, in charging the petitioner's claim upon the income of the property during the receivership, and, that being inadequate, upon the proceeds of the property itself. Counsel for the petitioner will prepare the proper decree, and, after submitting it to counsel for the respondents, will present it to the court for examination.

Priority of Claims Against Receiver.—See *Marshall v. Western, etc., R. Co.*, 20 Am. & Eng. R. R. Cas. 578; *Miltenerberger v. Logansport, etc., R. Co.*, 12 Ib. 464; *Burnham v. Bowen*, 17 Ib. 308; *Langdon v. Vermont, etc., R. Co.*, 11 Ib. 688. Note to *Nashville, etc., R. Co. v. Hallerbach*, 24 Ib. 351; *Frayser v. Richmond, etc., R. Co.*, 25 Am. & Eng. R. R. Cas. 597; *Union Trust Co. v. Illinois Mid. R. Co.*, 25 Ib. 560; note, 35 Ib. 112; *Central Trust Co. v. New York, etc., R. Co.*, 35 Ib. 9; *Addison v. Lewis*, 9 Ib. 703; *Taylor v. Philadelphia, etc., R. Co.*, 1 Ib. 632; *D. M. & B. Co. v. Case*, 1 Ib. 630; *Harrison v. C. M. R. Co.*, 1 Ib. 601; *Gilbert v. W. C., etc., R. Co.*, 1 Ib. 512; *Williamson v. W. C., etc., R. Co.*, 1 Ib. 498.

CHICAGO, R. I. AND P. R. CO.

v.

WISCONSIN, I. AND N. R. CO.

(*Iowa Supreme Court, January 23, 1889.*)

Railways—Contract for Right of Way—Deposit of Money—Laches.—Where, in pursuance of a contract for the purchase of a right of way, the purchase price is deposited with a third party to be paid on delivery of the deed to him, and through unreasonable delay of the grantor the deed is not delivered until such third person has spent the deposit and become insolvent, an action will not lie against the grantor for the purchase price.

Same—Deposit—Agency of.—Such deposit was the joint agent of the parties.

Same—Return of Money—Evidence of.—Evidence that the deposit was paid the money to a certain firm who composed a Construction Company,

which company owned the defendant railway, is incompetent for the purpose of showing that the money was returned to the defendant.

APPEAL from District Court, Polk County.

An action in equity, by which the plaintiff seeks the specific performance of a contract for the right of way for a railroad over certain real estate. An answer was filed, and a hearing was had upon the merits, which resulted in a decree for the plaintiff. Defendant appeals. The facts are sufficiently stated in the opinion.

Hubbard & Dawley for appellants.

Thos. S. Wright and Cummins & Wright for appellee.

ROTHROCK, J.—This controversy originated over the right of the defendant to construct its railroad over certain right of way, railroad tracks, and lands of the plaintiff. Defendant entered upon the premises, and commenced the work of construction, without having first arranged with the plaintiff for the right to occupy the land with its road. The plaintiff demanded that an adjustment be made, and the right of way paid for. Correspondence was had between the agents of the respective companies, and an arrangement was made, which was reduced to writing. The plaintiff was unwilling to permit the defendant to proceed with the construction of its road over the premises without some further assurance than the promise of the defendant that the amount agreed upon would be paid to the plaintiff upon the delivery of a deed for the right of way. The amount to be paid was \$1000. A contract in writing was prepared, which fully set forth the agreement and understanding of the parties. By agreement of the parties the sum of \$1000 was deposited by the defendant with one B. L. Harding, to be paid to the plaintiff upon the execution and delivery of a proper deed conveying the right of way by plaintiff to the defendant. On the 20th day of December, 1883, the representative of the plaintiff prepared the following writing: "B. L. Harding: On delivery of deeds from C., R. I. & P. R. Co., for the property mentioned in the annexed memorandum, you will pay to said company the sum of one thousand dollars." This order was signed by the superintendent of the defendant, and accepted by B. L. Harding in these words: "I hereby accept the above order. B. L. Harding." Within a few days thereafter, the defendant deposited \$1000 with Harding with directions to pay it to the plaintiff upon the delivery to him of the deed properly executed. The contract for the deed was executed by the proper officers of the defendant at Marshalltown, at about the same date. It was returned to the plaintiff's attorney at Des Moines, prior to the 24th day of December, 1883. In some of the correspondence between the parties it appears that duplicate contracts were executed. It is, however,

Facts.

immaterial whether there was but a single paper or duplicates. The contract was forwarded to Chicago for execution by the proper officers of the plaintiff. It does not appear that duplicates were sent to Chicago. On the contrary, we think but one paper was sent. It was never returned. The reason given by the plaintiff for not signing and returning it was that by accident it became defaced and blotted with ink. Some months thereafter, probably in March, 1884, the plaintiff prepared, executed, and sent to the defendant's superintendent what purported to be two copies of its original contract, with a request that defendant execute the same, and keep one and return the other. This was not done by defendant until May 8, 1885. On that day the copies of the contract were returned to the plaintiff, properly executed. On the 20th day of October, 1885, the plaintiff addressed the defendant a letter, stating that the deed for the right of way was executed, and inquiring to whom it should be presented for the payment of the \$1000 agreed upon. The superintendent of the defendant replied by advising the plaintiff that upon presentation of the deed to B. L. Harding it would be entitled to receive the money from him. Thereupon the deed was tendered to the defendant, and the payment of the \$1000 demanded, and payment was refused, and this suit was commenced.

It should be stated that the accepted order for the payment of the \$1000 was delivered to the plaintiff at the time it was accepted; and it is agreed by the parties that on the 20th day of December, 1883, B. L. Harding, the acceptor, was solvent, and there is no evidence that he became insolvent until about March, 1885. It appears that since that time, and now, an action against him on the order would accomplish nothing in the way of collecting the money of him. The order recites that a memorandum of the contract between the parties was affixed thereto. There is some conflict in the evidence whether this recital is true. It appears to us that the preponderance of the evidence is to the effect that such a writing was attached to the order. It is evident that this was done for the purpose of enabling Harding to determine whether the deed when presented was in accord with the contract. The contract contained quite a complicated description of the right of way to be conveyed, and it contained undertakings upon the part of the defendant as to putting in and maintaining crossings over the track, and making the changes of grade rendered necessary by the construction of its road. There is nothing in the evidence from which it appears that the making of the conveyance was to be delayed to any definite time. The defendant had no interest to be subserved by the delay. It actually paid the money consideration

Delay in making conveyance.

for the right of way, and it had no right to recall it. It was in the hands of Harding, awaiting the presentation of the deed, and the plaintiff was alone entitled to it. It is claimed by appellee that it was not contemplated that the deed should be delivered to Harding until the other collateral undertakings of the defendant should be performed. But some of them could not be performed. For example, the maintenance of crossings was a continuous obligation, and the plaintiff had full protection against any failure of the defendant to perform these collateral undertakings by proper recitals and reservations in the deed; and these recitals are in the deed which was finally made and tendered to the defendant. Indeed, it appears to us that there was no reason for delay in making the deed.

There are charges and counter-charges of negligence made by the parties. The plaintiff claims that the defendant was a trespasser upon the land; that it entered thereon without leave or license; and that it was negligent in the matter of making the adjustment, which was finally made about October 20, 1883. In the view we take of the case, all of the negotiations between the parties were merged in the settlement of their rights, which was made by the execution of the contract, and the deposit of the money, by the defendant. At that time the legal rights of the parties were fixed. The contract was signed by the defendant, and there was no obstacle in the way of its enforcement by the plaintiff. The marring and blotting of the contract did not destroy it, nor release the defendant from its obligation. When the second contract, or rather, what now appears to be a copy of the first, was written and executed by the plaintiff and sent to the defendant for execution, it is true the defendant delayed and neglected the return of it for a long time. But this is accounted for by the fact that defendant had no copy of the original and desired to have the original that it might determine whether the copy was correct. Whether this excuse is sufficient is not material, because the plaintiff did not require another contract in order to protect itself, and the action is not based upon the second contract or copy of the first. It is founded upon the contract executed in December, 1883, which is the original instrument.

The defendant relies upon two defences to the action: First, it is claimed that the execution of the order, the acceptance by Harding, and the deposit of the money, with the delivery of the order to the plaintiff, was an absolute payment for the right of way; and, second, that by reason of the negligence of the plaintiff in unreasonably delaying the execution and presentation of the deed to Harding,

Charges and counter-charges—Rights fixed by contract.

Defendant's defences.

the loss of the money should be borne by the plaintiff. In view of our decision upon the second point it is unnecessary to determine the first. If Harding had failed after the deposit of

**Deposit of
money as pay-
ment for right
of way.**

the money with him and within the reasonable time allowed the plaintiff for executing and presenting the deed, it would seem inequitable to hold that payment was actually made when the money was deposited. But the defendant was entitled to the exercise of reasonable diligence on the part of the plaintiff, and the evidence shows that if the deed had been made and presented at any time prior to March, 1885, the money would have been paid by Harding. There is no showing that he became insolvent before that time. As we have said, the plaintiff was alone authorized to present the deed and order, and draw the money. It ought not to have subjected the money to the peril of delay. No tender of a deed was made for nearly two years after it might reasonably have been done. If the order accepted by Harding had been a negotiable bill of exchange, it would have been incumbent on the plaintiff to present it for payment and protest it. The fact that it was not negotiable does not excuse the plaintiff for unreasonable delay in presenting it. It had no right to make a new contract, extending the time of payment, or, what is very nearly or quite equivalent thereto, if it was guilty of laches in performing its part of the contract by making and presenting the deed, it did so at its peril. It had no right to delay the presentation of the deed until Harding became insolvent, and to justify its delay upon the ground that Harding was the defendant's agent, and the custodian of defendant's money. As supporting these views, see *Southwick v. Sax*, 9 Wend. 121; *Dayton v. Trull*, 23 Wend. 345, and *Insurance Co. v. Allen*, 11 Mich. 509. It is important to keep in mind the relation which Harding bore to the parties. He was not the agent of the defendant, nor of the plaintiff alone. He was selected by defendant and approved by plaintiff, as the custodian of the money until the contract could be fully executed. He held the money for the security of the plaintiff as to part of the consideration and for the security of the defendant, not for the acquiring of the right of way, but merely for the deed, which was but the evidence of title to the right of way. If this be true, why should defendant be liable for the failure of their joint agent? The money was beyond its control, and was within the control of the plaintiff, and there is no showing that the defendant prevented the complete execution of the contract by its laches.

2. Another feature of the case demands consideration. B. L. Harding was examined as a witness in behalf of the plaintiff.

He was permitted to testify over defendant's objection that R. T. Wilson and Co. were the Iowa Improvement Co.; and that they owned the Wisconsin, Iowa & Nebraska R.; that he entered the \$1000 to the credit of R. T. Wilson & Co., paid it out for the defendant, and rendered accounts to R. T. Wilson & Co. This evidence was incompetent, and should not have been considered by the court. If it was considered for any purpose it was to prove that the defendant took back the money from Harding, and thus prevented him from making payment to plaintiff. Evidence of dealings with R. T. Wilson & Co. had no tendency to prove that fact. This transaction was not with R. T. Wilson & Co. The contract was with a corporation known as the Wisconsin, Iowa & Nebraska R. Co. Evidence that this money was paid to another does not support the claim made by the witness that it was paid to the defendant. The decree of the district court will be reversed; and as the defendant by a cross-bill demands that the plaintiff be required to make to it a conveyance of the right of way, it will be so decreed, and a decree may be entered in this court or in the district court, at defendant's option. Reversed.

Railway Companies—Laches—Effect of.—As to the effect of laches and delay, see, *ante*, Foster v. Mansfield, C. & L. M. R. Co., 281 and note, 297; Beekman v. Hudson R. W. S. R. Co., 321 and note, 331.

CHICAGO, B. AND Q. R. CO. v. PORTER *et al.*

CHICAGO, R. I. AND P. R. CO. v. SAME.

(Iowa Supreme Court, October 6, 1887.)

Riparian Owners—Navigable Stream—High-water Mark—Title Beyond.—The owners of land bounded by a navigable river have no title beyond high-water mark.

Same—Repeal of Law Declaring Stream Navigable—Effect on Owner's Title.—The repeal of an act of Congress declaring a river to be navigable, does not invest riparian owners with the title to the bed of the river.

Same—Railroad Companies—Acquiring Title to Bed of River.—Under Sec. 1328 of the Revision of 1860 of Laws of Iowa, where the title to the bed of the river is in the state, railroad corporations may acquire title to a portion of the same by appropriating it to the uses of their roads.

Same—Extent of Interest Acquired.—The right acquired under such statute extends to the full width of land occupied by their embankments as against the claims of owners of land bounded by the river.

Same—Accretions—Rights to.—Where lands below high-water mark are so appropriated, the rights of riparian owners by accretion do not attach thereto.

Same—Rights under Statute—Sufficiency of Allegation.—In an action to restrain encroachments upon lands acquired in pursuance of the statute, it is sufficient allegation of title in the bill to allege that plaintiff has the "legal right to take, hold, and use the same," without setting forth the statute.

APPEAL from District Court, Wapello County.

These are actions in equity by which the plaintiffs seek to enjoin the defendants from maintaining a wooden building, and from completing the erection of a brick building, upon land alleged to be within the plaintiff's right of way, and near to their railroad tracks. On hearing in the court below upon an application for a temporary injunction, the injunction was allowed as to the brick building and denied as to the wooden building. The defendants appeal. The facts sufficiently appear in the opinion.

McNett & Tisdale for appellants.

David C. Beaman for Chicago, B. & Q. R. Co.; *Thos. F. Wright* for Chicago, R. I. & P. R. Co.

ROTHROCK, J.—The two causes were heard and determined in the court below upon the same evidence, and they are presented in this court upon one abstract, and upon the same arguments. The ultimate question involved in both cases is, have the plaintiffs such a right to the land upon which the brick building is in course of erection as to entitle them to an injunction preventing the defendants from so using the land?

It appears from the evidence that the railroad now owned by the Chicago, Rock Island & Pacific R. Co. was constructed in 1859 or 1860, and that the road now belonging to the Chicago, Burlington & Quincy Co. was built in 1865. The

Question involved. The land in controversy is situated at the city of Ottumwa, on the Des Moines river. The railroads were constructed across a bend in the river, upon land which was below ordinary high-water mark. The defendants are owners of the land which was bounded by the river at the point opposite to the lines of railroad. The Chicago, Rock Island & Pacific road was built next to the shore of the river, and the other road further out in the stream. The lines were practically parallel with each other, and about 80 feet apart. The land being below ordinary high-water mark, it was necessary to raise embankments upon which to lay the tracks. These embankments were from 16 to 18 feet in height, and 14 or 15 feet wide on top, with a width of base of from 63 to 68 feet. These figures may not be entirely accurate, and there is quite a controversy between the parties as to whether the bases of the two embankments met and overlapped each other. We do not regard this as an important

Facts.

question in the case, because whether the embankments covered the whole of the intervening space or not does not appear to us to be a controlling feature of the case.

The brick building, the subject of the controversy, is situated between the two railroads, and within a few feet of the tracks of the respective roads. It may not be that these tracks are as close to each other as those originally laid. Both roads have side tracks which have been laid since the original embankments were made, but this fact we regard as of no importance in determining the rights of the parties. We think that if it be held that the plaintiffs had the right to appropriate the land, and construct their roads upon it, that right extended at least to the base of the embankment of each road, because the base of the embankment was as much a part of the structure as the ties and iron rails; and the defendants have no right to construct a building which encroaches upon any part of the embankment, whether the attempt is made upon the surface, as made by the plaintiffs, or by using that surface as a base upon which to fill up the intervening space to a suitable height upon which to erect a building. The building in course of erection is so near the tracks of each road that a perpendicular line downward from each end of it would cut the respective embankments as they were originally constructed. The building in question is 45 feet long.

It is conceded that the railroads were constructed below ordinary high-water mark. The Des Moines river was declared to be a navigable stream by act of congress dated August 8, 1846. The defendants or their grantors, being the owners of the land bounded by the river, had no title beyond ^{Title to river-bed.} ordinary high-water mark. The title to the whole bed of the river was in the state. *McManus v. Carmichael*, 3 Iowa, 1; *Tomlin v. Railroad Co.*, 32 Iowa, 106; *Musser v. Hershey*, 42 Iowa, 356. The act declaring the stream to be navigable was repealed by an act of congress passed January 20, 1870. But this court has three times determined that the repealing act did not invest riparian owners with title to the bed of the river, and that the boundaries of their lands were not extended thereby. *Wood v. Railroad Co.*, 60 Iowa, 456; *Serrin v. Giefe*, 25 N. W. Rep. 227; and *Steele v. Sanchez*, 33 N. W. Rep. 336. In *Wood's Case* it was held that the riparian owner could not maintain an action to recover possession of land, being below ordinary high-water mark, from the railroad company, which began to occupy the same with its road-bed while the river was yet, in contemplation of law, a navigable stream. That action was against one of the plaintiffs herein, and it is said that the land in controversy in that case was near the land in dispute in the suits at bar.

Did the plaintiffs acquire any right to that part of the bed of the river by appropriating the same for the use of their roads?

Section 1328 of the Revision of 1860, which was in force when the plaintiffs' railroads were constructed, is as follows: "Any railroad corporation shall be authorized to pass over, occupy, and enjoy, without payment of damages, any of the school, university, and saline or other lands of this state: provided, no more of such lands shall be taken than is required for the necessary use and convenience of such corporation."

In the case of *Tomlin v. Railroad Co.*, 32 Iowa, 106, the defendant constructed its railroad along the Mississippi river, below ordinary high-water mark. Tomlin, the riparian proprietor, claimed that he was entitled to damages by reason of the construction of the road. It was held that he had no cause of action. The decision was based upon the idea that the railroad was constructed under legislative authority. It is true, as claimed by counsel for appellant, that the section of the statute above cited is not quoted in the opinion. But, as there was no other act of the legislature then in force granting that right, this provision of the statute must have been in the mind of the court. That such was the fact is recognized in the case of *Renwick v. Railroad Co.*, 49 Iowa, 664.

It appears to us that there can be no doubt that the cited statute authorized the construction of the plaintiffs' roads, and that they acquired the right thereunder to hold and possess at least the full width of land which they actually appropriated by their embankments, as against all claims of the owners of land bounded by the river.

But counsel for the defendants claim that the land upon which they propose to erect and maintain the brick building was made by accretion. The technical definition of accretion,

Land made by accretion.

as defined by Bouvier, is "the increase of real estate by the addition of portions of soil by gradual deposition, through the operation of natural causes, to that already in possession of the owner." It may be that an owner of real estate bounded by a stream may have the right to construct walls or other contrivances to prevent encroachments of the stream upon his land, and by these artificial additions to the banks he may use the land below ordinary high-water mark. But we do not think any right by accretion attached to the land in controversy. If the claim be well founded, all of the land now occupied by both railroads is the property of the defendants, under the doctrine of accretion, and the line of defendants' land is the present high-water mark of the Des Moines river. We have seen that the roads were lawfully constructed upon the public lands of the state, and the defendants have no title nor right thereto. And it is equally untenable to claim that the defendants have any right to take possession of any land across the land appropriated by the Rock Island R. Co., and erect a build-

ing between the two roads. The lawful appropriation of the land by the Rock Island R. Co. cut off accretions to defendants' land, and established a line beyond which no right by accretion can be acquired. To so hold would invest the defendants with the title to a tract of land between the railroads in no manner connected with their land upon the shore of the river.

2. The above considerations dispose of the question as to the ownership and right of possession of the land in controversy, abstractly considered. But the defendants claim that the plaintiffs have no right to an injunction, because they did not allege in their pleadings that they took and held the land under the provisions of the statute above cited. This was not necessary. They did aver that they had the "legal right to take, hold, use, and occupy a right of way 100 feet wide" over the land in controversy. The legal right was based upon a public statute of the state which it was not necessary to set forth or cite in the pleadings.

Not necessary to allege holding land under statute.

3. There were certain deeds made by riparian owners, and the defendants deposited earth between the railroads to bring the surface up to a level with the railroad tracks. It is claimed that these acts estop the plaintiffs from now making claim to the land. We do not think, in view of the evidence, that the doctrine of estoppel can have any application. There is nothing in the record showing that any officer of the plaintiffs had any knowledge that any claim to the land was made by the defendants until the commencement of the erection of the building.

Plaintiffs not estopped.

4. It is further claimed that injunction is not the proper remedy; that the action should have been at law, for damages. We do not think this position is well taken. There can be no doubt that equity will enjoin encroachments upon land by making excavations, erecting permanent buildings, and the like.

Remedy by injunction.

In our opinion the injunction was rightly granted. Affirmed.

Riparian Owners—Accretion.—It is a general rule of law that the owner of land on a stream has a right to all the accretion thereof caused by the deposition of alluvion thereon, without regard to the question whether such accretions were formed solely by natural causes or by such causes influenced by the artificial works of others and without regard to the question whether such stream is navigable or not. See *Lovington v. Co. of St. Clair*, 64 Ill. 56; s. c., 16 Am. Rep. 516; *Seaman v. Smith*, 24 Ill. 523; *Godfrey v. City of Alton*, 12 Ill. 29; *Kraut v. Crawford*, 18 Iowa, 549; *Miller v. Hepburn*, 8 Bush (Ky.) 326; *Municipality No. 2 v. Cotton Press*, 18 La. 122; s. c., 36 Am. Dec. 624; *Barrett v. New Orleans*, 13 La. An. 105; *DeLord v. New Orleans*, 11 La. An. 699; *Kennedy v. Municipality No. 2*, 10 La. An. 54; *Patterson v. Gelston*, 23 Md. 432; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Giraud v. Hughes*, 1 Gill. & J. (Md.) 249; *Deer-*

field v. Arms, 34 Mass. (17 Pick.) 41; s.c., 28 Am. Dec. 271; Hopkins Academy v. Dickinson, 63 Mass. (9 Cush.) 544; Adams v. Frothingham, 3 Mass. 353; Benson v. Morrow, 61 Mo. 353; Smith v. St. Louis Schools, 30 Mo. 290; Lammers v. Nissen, 4 Neb. 245; Halsey v. McCormick, 18 N. Y. 147; Wetmore v. Atl. White Lead Co., 37 Barb. (N. Y.) 70; Niehaus v. Shepherd, 26 Ohio St. 45; Minto v. Delaney, 7 Oreg. 337; Morgan v. Scott, 26 Pa. St. 51; Posey v. James, 7 Lea (Tenn.), 98; Barney v. Keokuk, 94 U. S. (4 Otto) 324; bk. 24, L. ed. 224; St. Louis Schools v. Risley, 77 U. S. (10 Wall.) 110; bk. 19, L. ed. 850; Saulet v. Shepherd, 71 U. S. (4 Wall.) 502; bk. 18, L. ed. 442; Jones v. Soulard, 65 U. S. (24 How.) 41; bk. 16, L. ed. 604; Jones v. Johnston, 59 U. S. (18 How.) 150; bk. 15, L. ed. 320; New Orleans v. United States, 35 U. S. (10 Pet.) 662; bk. 9, L. ed. 573; Handly v. Anthony, 18 U. S. (5 Wheat.) 380; bk. 5, L. ed. 113. *Compare* Ferrier v. New Orleans, 35 La. An. 209.

Title to accretions depends upon actual contiguity. Any separation of the claimant's land from the alluvion by the land of another defeats the claim. Bristoll v. Carroll County, 95 Ill. 84; New Orleans v. Gravier, 11 Mart. (La.) 620; *Re* State Reservation Comm'rs., 37 Hun (N. Y.), 537; Beaufort v. Duncan, 1 Jones (N. C.), 234; Posey v. James, 7 Lea (Tenn.), 98; Saulet v. Shepherd, 71 U. S. (4 Wall.) 502; bk. 18, L. ed. 442; Bates v. Illinois Cent. R. Co., 68 U. S. (1 Black) 204, bk. 17, L. ed. 158. Thus where a street has been laid off and dedicated to public use, which street separates the land of the claimant from the alluvion, it will defeat his claim to title. Donovan v. New Orleans, 35 La. An. 461; Municipality No. 2 v. Cotton Press, 18 La. An. 122; s. c., 36 Am. Dec. 624; Wetmore v. Atl. White Lead Co., 37 Barb. (N. Y.) 70; Banks v. Ogden, 69 U. S. (2 Wall.) 57; bk. 17, L. ed., 818.

For a full discussion of the question of the right to accretions, see 1 Am. & Eng. Encyc. of L. 136-143.

SOUTHERN PACIFIC R. CO.

v.

ESQUIBEL.

(*New Mexico Supreme Court, January, 1889.*)

Railroad Companies—Acts Incorporating—Construction.—The acts of congress approved respectively March 3, 1871, and May 2, 1872, incorporating the Texas & Pacific R. Co. and providing for aid in its construction, contemplated a road for government services, to be under one management and control, and not an easement and dependency in a system of railroads owned and controlled by different corporations.

Same—Power to Make Running Engagements—Transfer of Privileges.—The provisions of said acts conferring the power to make running arrangements with other railroads do not confer authority to transfer its privileges to other companies.

Same—Consolidation—Sale of Franchise.—The provisions of said acts, empowering the company to purchase the land grant and franchise of and to consolidate with any railroad company chartered on the route, do not authorize the transfer of its own land grant, road, and franchises.

Same—Power to Mortgage—Sale Order.—A power to sell is not included in a power to mortgage.

Same—Power to Procure Means to Construct—Limit of.—The power granted said company to procure means to construct the road was a particular power, to be exercised for that specified object.

Same—Failure to Complete—Power of Congress—Forfeiture of Land Grant.—Said acts reserving to congress the right to adopt such measures as it might deem necessary and proper to secure the speedy completion of the road, upon failure of the company to complete it, authorize the forfeiture of the land grant. Such reservation being for the protection of the government and not for the benefit of the company.

APPEAL from District Court. The opinion states the case.

Catron, Thornton & Clancy for appellant.

Rynerson & Waldow for appellee.

REEVES, J.—Upon the trial of the above-entitled cause it was stipulated by the parties that the facts relating thereto were as follows:

First. The Southern Pacific R. Co. of New Mexico is a corporation organized under the laws of the territory of New Mexico in the year 1880. Facts.

Second. The Texas & Pacific R. Co. is a corporation organized under an act of congress entitled "An act to incorporate the Texas & Pacific R. Co. and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and an act of congress entitled "An act supplementary to an act entitled 'An act to incorporate the Texas & Pacific R. Co. and to aid in the construction of its road, and for other purposes,'" approved March 3, 1871,—this last-mentioned act having been approved May 2, 1872,—which said two acts are hereby made a part of the stipulation, copies thereof being attached hereto, marked "Exhibits."

Third. The Texas & Pacific R. Co. accepted said charter of incorporation, and within the time therein provided was organized thereunder.

Fourth. Within two years after the passage of said act of March 3, 1871, and in accordance with said two acts, the said Texas & Pacific R. Co. did designate the general route of the said road as near as might be, and did file a map of the same in the department of the interior at Washington, which said general route so designated corresponded with the line of road constructed as hereinafter stated by the Southern Pacific R. Co. of New Mexico.

Fifth. Immediately after the filing of said map the secretary of the interior caused the lands within 40 miles on each side of said designated route within the territories of New Mexico and Arizona, and 20 miles within the state of California, to be withdrawn from pre-emption, private entry, and sale.

Sixth. That thereafter the said Texas & Pacific R. Co. did commence the construction of its road at the eastern terminus thereof, at or near Marshall, in the state of Texas, as described in said act, and did prosecute the same, and have the same completed at or near El Paso, designated as a point on said road by said acts of congress, on or before the 2d day of May, 1882.

Seventh. That the Southern Pacific R. Co. of New Mexico, in the years 1880 and 1881, after the organization, constructed a railroad of the character, kind, and description required by said two acts of congress, from the western boundary line of the territory of New Mexico, through the territory of New Mexico, on the said line of the general route of said Texas & Pacific R. Co., as designated in and by the said map filed in the department of the interior as aforesaid, to the state line of Texas, on the Rio Grande river, near El Paso, Texas, and connected the same with the said Texas & Pacific R., constructed as aforesaid, at or near El Paso, as aforesaid.

Eighth. After the completion of the Southern Pacific R. to El Paso, the Texas & Pacific R. Co. claimed and insisted that the same was built upon its right of way under said acts of incorporation, and that the said road thereby became the property of said Texas & Pacific R. Co., and thereupon in May, 1881, commenced a suit in the third judicial district court of the territory of New Mexico against the Southern Pacific R. Co. of New Mexico, to have said road so constructed by the said Southern Pacific R. Co. of New Mexico decreed to be the property of said Texas & Pacific R. Co.; a copy of the bill of complaint in said cause being hereto attached and made a part of this agreement, as also is a copy of the order made by Hon. Warren Bristol, as judge of said district court, on the filing of said bill of complaint.

Ninth. That during the pendency of said suit the said Texas & Pacific R. Co. definitely fixed the line of its proposed road, under said acts of congress, across the territory of New Mexico, at the centre of the road-bed of the said road constructed as aforesaid by the Southern Pacific R. Co. of New Mexico, in the manner so required by law.

Tenth. Owing to doubts and uncertainties as to the result of said legislation, and for reasons therein stated, an agreement to compromise the same was entered into by and between the said Texas & Pacific R. Co. and the Southern Pacific R. Co. of New Mexico, a copy of which said agreement is filed herewith, and made a part of this stipulation, as evidence in this cause, and that in accordance with said agreement a decree was entered in said cause, a copy of which is filed herewith, and made a part of this stipulation, as evidence in this cause, and also two deeds of conveyance were made and executed by the said Texas &

Pacific R. Co. to the said Southern Pacific R. Co. of New Mexico, by one of which was conveyed all the right, title, interest, claim, and demand of said Texas & Pacific R. Co. in and to the right of way, 200 feet wide, from the Arizona line across New Mexico, at or near El Paso, on the line of the road of the Southern Pacific R. Co. of New Mexico, a copy of which said deed is hereto attached, and made a part of the stipulation, as evidence in said cause,—the other deed of conveyance being an assignment and conveyance to the Southern Pacific R. Co. of New Mexico by the Texas & Pacific R. Co. of the right of way to take materials from the public lands; also grounds for station buildings, workshops, wharves, switches, side tracks, and depot grounds; also the right of franchise of the Texas & Pacific R. Co. to lay out, locate, construct, finish, maintain, and enjoy a continuous railroad and telegraph line, with appurtenances, from a point on the Rio Grande near El Paso, westward, on the most direct and eligible route near the thirty-second parallel of north latitude, granted to said Texas & Pacific R. Co. by said acts of congress; and also all the lands granted to said Texas & Pacific R. Co. by the ninth section of said act of congress approved March 3, 1871, to aid in the construction of the railroad and telegraph line described in the first section of said act; a copy of which said conveyance is attached hereto, and made a part of this stipulation, as evidence in this cause.

Eleventh. That the said railroad to be constructed under and in accordance with the said two acts of March 3, 1871, and May 2, 1872, has not been completed in that portion of the state of California between the Colorado river and San Diego.

Twelfth. That the said defendant, since the said Texas & Pacific R. Co. designated its general route and filed a map thereof as aforesaid, and after it had definitely fixed the line of said road across the territory of New Mexico, and after the making of said agreement with the Southern Pacific R. Co. of New Mexico, and entering the said decree, and making, executing, and delivering the said two deeds of conveyance, the said defendant entered upon the land in question, which is a part of one of the odd sections within 40 miles of the line of said road as fixed and designated by the Texas & Pacific R. Co. as aforesaid, said land in question being situated in the county of Dona Ana, and said defendant occupied and held possession of same, at the time of the commencement of this suit, adverse to plaintiff.

Thirteenth. That on February 28, 1885, an act of congress in the following words was passed and approved:

“That all lands granted to the Texas Pacific R. Co. under the act of congress entitled ‘An act to incorporate the Texas Pacific R. Co., and to aid in the construction of its road, and for

other purposes, approved March 3, 1871, and acts amendatory thereof or supplemental thereto, be, and they are hereby, declared forfeited, and the whole of said lands restored to the public domain, and made subject to the disposal under the general laws of the United States as though said grant had never been made: provided, that the price of the lands so forfeited and restored shall be the same as heretofore fixed for the even sections within said grant.

"Sec. 2. That the act of March 3d, 1875, entitled 'An act for the relief of settlers within railroad limits,' is hereby repealed." Approved February 28, 1885.

Fourteenth. That said defendant, on the 27th day of March, A.D. 1885, filed his homestead entry on the land in question with the register of the United States land-office at Las Cruces, N. M., paid the lawful fees for the same, and received the usual certificate therefor.

After the evidence was closed the plaintiff moved the court to instruct the jury that under the evidence they should find the defendant guilty, but the court refused the instruction, and to this decision and ruling of the court the plaintiff excepted. Whereupon the court, upon the motion of the defendant, instructed the jury as follows, to-wit: "The court instructs the jury, under the facts stipulated and read in evidence in the case, the plaintiff has not made out such a case as entitles it to recover a verdict against the defendant. The jury will therefore find the defendant not guilty;" to which the plaintiff excepted. Whereupon the jury returned a verdict as follows, to-wit: "We, the jury in the above-entitled cause, do find the defendant not guilty." And thereupon the plaintiff, by its counsel, moved the court for a new trial, for the reason that the verdict was against the law and the evidence in the cause, which the court overruled, and dismissed the suit at the plaintiff's costs; and thereupon the plaintiff excepted, and moves the court to grant it an appeal from the judgment to the supreme court of the territory, which motion was granted, and the plaintiff brings the case into the supreme court by appeal, and assigns for error: (1) The court erred in directing the jury to find the defendant not guilty; (2) the court erred in refusing to give the instructions prayed for by plaintiff to find the defendant guilty; (3) said judgment was rendered in favor of defendant, when it should have been rendered in favor of the plaintiff.

It is contended for the appellant that the grant of the land in question to the Texas & Pacific R. Co. was a grant *in presenti* and had the effect to convey the land to said railroad company; referring to the ninth section of the act of March 3, 1871. This section provides "that,

Instructions
to jury - As-
signments of
errors.

Whether grant
was in pre-
senti.

for the purpose of aiding in the construction of the railroad and telegraph line herein provided for, there is hereby granted to the said Texas Pacific R. Co., its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as such line may be adopted by said company, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. . . ."

The sections designated as granted were incapable of identification until the line of the road should be "definitely fixed." "When the route is established the grant takes effect upon the sections by relation as of the date of the act of congress. In that sense the grant is one *in præsentî*. . . ." *Van Wyck v. Knevals*, 106 U. S. 365, 366; s. c., 10 Am. & Eng. R. R. Cas. 664.

The act intended that the location of the road should be as followed by its construction. *Railroad Co. v. Railway Co.*, 97 U. S. 498, and section 13 of the act of congress. This section provided that the president of the company should annually make a report, and file it with the secretary of the interior, which report should be under oath, exhibiting, among other things, the number of miles of road constructed each year, and a description of the lines of road surveyed and fixed upon for construction. Section 12 provided that whenever the company should complete the first and each succeeding section of 20 consecutive miles of railroad, and put it in running order as a first-class road in all its appointments, it should be the duty of the secretary of the interior to cause patents to be issued conveying to the company the number of sections of land opposite to and coterminous with the completed road to which the company should be entitled for each section so completed. Section 18: That the president of the United States, upon the completion of the first section of 20 miles, should appoint one commissioner, whose duty it should be to examine the various sections of 20 miles as they should be completed, and report thereon to him in writing; and if, from said report, he was satisfied that the company had fully completed each section of its road, as in the act provided, he should direct the secretary of the interior to issue patents to said company for the lands it was entitled to under the act, as fast as each section of the road was completed.

Provisions and intentions of act of incorporation.

The company, within two years after the passage of the act

of March 3, 1871, designated the general route in the department of the interior. The secretary of the interior then caused the land within 40 miles on each side of the designated route within the territory of New Mexico and Arizona, and 20 miles within the state of California, to be withdrawn from pre-emption, private entry, and sale. The map did not show the definite and fixed location of the road, but it was a map showing only the general route of the road.

Designation of
route—With-
drawal of
land.

At this point a statement of the case will be necessary to an understanding of the questions in controversy. The Southern Pacific R. Co. of New Mexico was organized under the laws of the territory in 1880. In the years of 1880 and 1881 this company constructed a railroad across the territory of New Mexico on the line of the road claimed by the Texas & Pacific R. Co. as its right of way. In its suit brought in 1881 the Texas & Pacific R. Co. sought a decree divesting all the title which the Southern Pacific R. Co. of New Mexico might have or claim in said road, with its fixtures, etc., and vesting it in the Texas & Pacific R. Co., and definitely fixed the line of the proposed road across the territory at the centre of the road-bed of the road constructed by the Southern Pacific R. Co. of New Mexico. It is not claimed by the Texas & Pacific R. Co. that the line of its road in the territory of New Mexico was definitely fixed before the Southern Pacific R. Co. of New Mexico had constructed its road across the territory. The suit was originally between the Texas & Pacific R. Co. and the Southern Pacific R. Co. of New Mexico. Other companies were made parties in the decree of the court, namely, the Southern Pacific R. Co. of California, the Los Angeles & San Diego R. Co., and the Central Pacific R. Co. Still other companies that owned or controlled connecting lines of road were also parties in the agreement and compromise, viz., the Missouri Pacific R. Co., the Missouri, Kansas & Texas R. Co., and the St. Louis, Iron Mountain & Southern R. Co. The suit was compromised on the terms set out in the argument of the parties and the decree of the court. By the terms of the agreement the Texas & Pacific R. Co. transferred to the Southern Pacific R. Co. of New Mexico its land grant and franchise to construct a railroad and telegraph line and other rights within the boundaries of the territory of New Mexico; a like transfer to the Southern Pacific R. Co. of the territory of Arizona of the land grant and franchises included within the boundaries of Arizona; a like transfer to the Los Angeles & San Diego R. Co. of the land grant and franchises, etc., included within the boundaries of the state of California.

Statement of
the case.

The consideration to the Texas & Pacific R. Co. for the trans-

fer was the agreement of the Southern Pacific R. Cos. that the road of the Texas & Pacific R. Co. and the roads of three Southern Pacific R. Cos. and their connections should be operated and used for all purposes of communication, travel, and transportation, so far as the public and government were concerned, as one continuous through line; the gross earnings to be divided between them in the proportion agreed upon.

The decree of the court contains, among other provisions, the following: "It is expressly considered, ordered, and adjudged that, except as to the rights, privileges, and easements aforesaid, the said Texas & Pacific R. Co. has no right, title, estate, claim, or demand, at law or in equity, in or to the way, right of way, and railroad, with its appurtenances, constructed by the Southern Pacific R. Co. of New Mexico, in the territory of New Mexico, or in or to the way, right of way, and railroad, with the appurtenances constructed by the Southern Pacific R. Co. of Arizona in the territory of Arizona."

The Texas & Pacific R. Co. had no right to entangle its affairs in these unauthorized transactions upon any assumption that they would be ratified by congress. *Com. v. Smith*, 10 Allen, 455; *Matthews v. Skinker*, 62 Mo. 329; *Boone, Corp.* § 243.

The acts of congress contemplated a road for postal, military, and other government services, to be under one management and control, and not an easement and dependency in the system of railways owned and controlled by other and different corporations, as provided by the terms of the agreement and decree of the court. The government was not bound by these proceedings, in which it was not a party; and, although it was stipulated by the parties that the road constructed by the Southern Pacific R. Co. of New Mexico was a road of the character, kind, and description required by the two acts of congress, it did not appear that the president of the United States, or the secretary of the interior, approved it as being completed in accordance with the requirements of those acts. The Texas & Pacific R. Co. had no right to make the transfer by virtue of the power conferred on the company by the fifth section of the act, to make running arrangements with other railroad companies, nor the power to transfer its own land grant, road, and franchises by authority of the fourth section of the act empowering the company to purchase the land grant and franchise of, and to consolidate with, any railroad company chartered on the route of the Texas & Pacific R. Co., but such transfer was contrary to the sixth section of the act, to the effect that the rights, franchises, and property of every description belonging to each of the consolidated or purchased com-

Contemplation
of act of con-
gress.

Power to make
running ar-
rangements
and transfer
land grant.

panies should vest in and become absolutely the property of the Texas & Pacific R. Co.

It was argued for the appellant that, if the land could be mortgaged for the means to construct, equip, and operate the road, it could be assigned, in the first place, for the same object. The doctrine that a power to mortgage includes a power to sell is not supported by authority of law. A corporation must exercise its powers in the mode prescribed in its charter. The

Power to mortgage—Other powers included in.

power to procure means to construct the road in question was not a general power; it was a particular power, to be exercised for a specific object. The Texas & Pacific R. Co. was authorized to issue construction and land bonds, and to execute mortgages to secure the bonds on its land grant and other lands the company might acquire; the proceeds of the sale of the bonds to be applied to the construction, operation, and equipment of the road, and for the purchase, construction, completion, equipment, and operating of the other roads, as contemplated and specified in the acts of congress. The acts require that the bonds and mortgages should contain an extract from the law authorizing them to be issued, and that the mortgages should be filed and recorded in the department of the interior. The appellant was not a mortgagee, nor a purchaser under a mortgage. No mortgage bond was given in aid of the construction of the road. Sections 11, 14, act March 3, 1871, and sections 2, 3, supp. act May 2, 1872.

It is further contended for the appellant that the proviso in the ninth section of the act implied the right to sell or otherwise dispose of the lands. The proviso is to the effect that the lands granted to the company by the ninth section of the act, which should not be sold or otherwise disposed of within three years after the completion of the road, should be subject to settlement and preemption like other lands. The proviso was a limitation on the power of the company to hold the lands beyond the period of three years after the completion of the road. How the lands were to be acquired, and to be sold or otherwise disposed of, must be determined from the provisions of the act viewed as a whole. The Texas & Pacific R. Co. was required by the act of congress to commence the construction of its road at a point at or near Marshall, in the state of Texas, and at San Diego, in the state of California, and to complete specified portions of the road in the stated times, and to complete the whole line from the point at or near Marshall to the Bay of San Diego within ten years after the passage of the act of March 3, 1871, extended to three years after the passage of the supplementary act of May 2, 1872. Upon compliance with the terms of the

Effect of proviso in ninth section.

act in relation to the times fixed for the completion of the road, it was provided that the land grant should "duly inure" to the company. Section 17, act March 3, 1871; section 5, supp. act May 2, 1872; id. § 2.

It was admitted on the evidence at the trial that the Texas & Pacific R. Co. commenced the construction of its road at the eastern terminus, near Marshall, and had it completed to El Paso, on or before the 2d day of May, 1882. This portion of the road was not in controversy in the suit. It was further admitted that the road had not been completed in that portion of the state of California between the Colorado river and San Diego.

Completion of road.

It is further contended for the appellant that there can be no forfeiture of the lands granted to the Texas & Pacific R. Co., because congress had reserved a right, not to forfeit, but to adopt such measures as it might deem necessary and proper to secure the speedy completion of the road upon failure of the company to complete it.

Right to forfeit grants.

The appellant, claiming under the defaulting railroad company, will not be heard to complain that the forfeiture of the land grant, thereby subjecting the lands to the control of congress, was not a proper measure to secure the completion of the road. The proviso was intended for the protection of the government, and not for the benefit of the railroad company. Time was of the essence of the contract. The Texas & Pacific R. Co. had incurred the forfeiture of its land grant by its failure to complete the road as required by the act of congress. The forfeiture may be asserted by the United States, through the action of congress or by judicial proceedings. *Schulenberg v. Harriman*, 21 Wall. 44; *Land Co. v. Courtright*, Id. 311; *Van Wyck v. Knevals*, 106 U. S. 368, 369; s. c., 10 Am. & Eng. R. R. Cas. 664. The appellant had no standing in court. The judgment is affirmed.

LONG, C. J., and BRINKER, J., concur.

Railways—Sale of Lands.—In the case of *In re Thackwray v. Young's Contract*, L. R. 40 Ch. Div. 34, a railway company on the 12th of July 1867, conveyed certain superfluous lands, the period for the sale of which under their special act expired on the 13th of July, 1867, and the conveyance contained a covenant by the purchasers that they would pay the purchase-money on or before the 12th of July, 1869, with interest in the meantime; and by an indenture of even date and made between the same parties, it was declared that until the whole of the purchase-money and interest were paid the company should have a lien on the deed of conveyance and the lands therein comprised:

Held, upon a summons under the Vendor and Purchaser Act, 1874, raising the question whether sec. 127 of the Lands Clauses Act, 1845, had been satisfied, that, having regard to expressions in the judgments of the court of appeal in *London & South Western R. Co. v. Gomm* to the

effect that when land is sold as superfluous no interest in it can be retained by the company, the question was one of such doubt that it must be left open and not answered in a way which would force the title on a purchaser or prejudice the vendor's title.

FERNOW

v.

CHICAGO, M. AND ST. P. R. CO.

(*Iowa Supreme Court, October 17, 1888.*)

Railroad Companies—Right of Way—Abandonment—Evidence.—Under section 1260 of the Code of Iowa, defining abandonment of right of way by a railroad company, nothing less than non-user for eight years will authorize the owner of the land, from which it was taken, to take possession thereof.

Same—Damages to Possession—When No Recovery for.—An owner who takes possession of such lands within the eight years prescribed by statute cannot recover damages to his possession.

APPEAL from District Court, Linn County. Facts sufficiently stated in the opinion.

Rickel & Crocker for appellant.

Mills & Keeler for appellee.

ROTHROCK, J.—On the 31st day of October, 1860, Solomon Fernow, who was then the owner of 160 acres of land,—by his deed, duly executed and acknowledged, granted the right of way through said land for a railroad, to the Dubuque, Marion & Western R. Co. A railroad was constructed upon said right of way; and it was operated until some time in the month of November, 1878, when the track was taken up by the defendant as the successor in interest of the Dubuque, Marion & Western R. Co., and no trains of cars were run upon said right of way until about July or August, 1886. The right of way was fenced by the railroad company. The plaintiff became the owner of the land as an heir of Solomon Fernow, deceased, and by conveyance from his coheirs. After the track was removed, he entered upon the land, removed the railroad fences, and built fences across the right of way. These acts were done without authority from the railroad company. In July or August, 1886, the defendant took down cross-fences, and laid down a railroad track, and run trains of cars thereon, and erected right-

of-way fences on each side of the road. These are the acts complained of by the plaintiff in his original petition, which was filed on the 28th day of July, 1886, and within eight years after the track was taken up and removed by the defendant.

The district court appears to have been of opinion that the defendant was not a trespasser by its re-entry upon the land, because of the provisions of section 1260 of the code, by which, if a right of way "shall not be used or operated for a period of eight years," the land and title thereto shall revert to the owner of the land from which the right of way was taken. All of the rulings upon the competency of the evidence appear to have been based upon this thought. If the theory upon which the case was tried was correct, these rulings upon the evidence are not erroneous; and, as we have reached the conclusion that the defendant was not a trespasser in re-entering upon the right of way for the purpose of constructing a railroad of some sort, no further consideration need be given to rulings upon the evidence. It is not claimed that the re-entry was for the purpose of removing earth or making excavations not authorized by the nature of the easement, as in *Vermilya v. Railway Co.*, 66 Iowa, 606; s. c., 23 Am. & Eng. R. R. Cas. 108. If there was a right of re-entry for the purpose of rebuilding the railroad, the plaintiff cannot claim that the re-entry was a trespass, and base his claim for recovery upon the character of road rebuilt, and the manner of the railway service thereon. And there is nothing in the conveyance of the right of way, in the way of condition, proviso, or limitation, as to the line of road, as in *Crosbie v. Railway Co.*, 62 Iowa, 189; s. c., 14 Am. & Eng. R. R. Cas. 463. Counsel have elaborately discussed the question of abandonment, independent of the statute above cited. It is claimed that the right to claim a forfeiture, as it existed at common law, is not taken away by the statute, but that the statute gives merely an additional remedy. We do not think the principle invoked by counsel is applicable to the question under consideration. As we understand the statute, it defines what shall be regarded as an abandonment of a right of way. It definitely fixes the rights of the parties, and under its provisions nothing less than non-user for eight years will authorize the owner of the land from which it was taken to take possession of the land; and at any time within the eight years the company owning the right of way has the right to again take up the use of which the right of way was granted; and it is very plain that the owner has no standing in a court of law to recover damages to his possession, for the sufficient reason that such possession was unauthorized and wrongful. And we may also say that we do not think the plaintiff's amendments to

Right of way—
Abandonment
—Evidence.

his petition gave him any standing that he did not have by virtue of his original petition. Affirmed.

Railroad Companies—Right of Way—Adverse Possession—Limitation of Action.—In 1852 a railroad company to which a right of way 200 feet in width had been conveyed by a deed containing a covenant by it to erect and maintain division fences, erected fences which included but 100 feet, and its grantor used and occupied the remainder, alleging the fence to be his line, and to have been established as such by compromise. In 1855, he conveyed subject to the right of way as theretofore granted, and successive grantees continued in the exclusive use and occupation of the land to the fences until 1886, during which time the company several times rebuilt the fences, and paid for damage by fire to land within the 200 feet. *Held*, that forcible entry and detainer by the company for land outside the fence was barred. *Illinois Cent. R. Co. v. Houghton* (Ill.), 18 N. E. Rep. 301.

CRISMAN

v.

SMITH.

(*New Jersey Court of Error and Appeal, May 23, 1888.*)

Railroad Company—Right of Way—Deed to—Delivery.—When a deed of a right of way is executed to a railroad company, and delivered to parties who assume on behalf the company, in consideration of the conveyance, to contract for the payment of the purchase price at a time stated, a subsequent delivery of the deed to the company with the knowledge of the grantor completes a conveyance free of all lien for the purchase price.

Same—Incumbrances—Subscription to—Pay Off.—Such contracts are the personal obligations of those assuming to contract for the company; and moneys subscribed to pay off incumbrances on the right of way and for no other purpose, are not applicable to the payment of the purchase price.

APPEAL from a decree in chancery directing defendant to account for certain moneys for which he was alleged to be accountable under a certain agreement.

The facts are stated in the opinion.

Joseph Coult for appellant.

Charles J. Roe for respondent.

DIXON, J.—Virgil H. Crisman appeals from a decree of the chancellor, by which he is ordered to account to James Roe's administrator for the money received, or which ought to have been collected by him, upon a voluntary subscription made by various persons, in the following words:

Facts.

"We, the subscribers hereto, agree to pay to Virgil H. Crisman, who is hereby appointed our agent to collect and receive the subscriptions hereon, the sums by us respectively subscribed and set opposite our names on demand, said sums being payable either in money or notes at the bank, payable in three months after date, which notes and money are to be used for the following purpose, and no other: To place the Sussex railroad extension from Newton to Branchville in the hands and under the control of the Sussex R. Co., free and clear of all incumbrance, with the agreement and promise on the part of said company that they will at once complete said road and operate the same to the village of Branchville, and will issue stock of said company to the subscribers therefor, and persons entitled thereto to the amount of \$125,000.

"This subscription not to be binding unless the sum of \$3,500 be hereto subscribed by responsible persons.

"Branchville, April 27, 1870."

The administrator's claim to the account is based upon the assertion that the object of the subscription included the payment to Obadiah P. Armstrong of a debt due to him for land over which the railroad extension ran; that Roe was a surety for the debt and paid part of it, and therefore his administrator is entitled to insist that the fund subscribed shall be applied to exonerate his estate from responsibility for the residue of the debt and to reimburse the estate for what Roe paid.

The foundation of the claim is that the payment of the debt to Armstrong is embraced in the object of the subscription. This object is in the writing subscribed, **Object of subscription.** explicitly stated to be "for the following purpose and no other: to place the Sussex Railroad extension from Newton to Branchville in the hands and under the control of the Sussex R. Co., free and clear of all incumbrance." This statement affords conclusive evidence of the object of the subscribers, and the authority and duty of Crisman were to apply the funds to this object solely, and if they were not all needed for that purpose, to restore the surplus to the subscribers in proportion to their contributions. *Abels v. McKee*, 3 C. E. Green, 462.

We must therefore first determine whether the payment to Armstrong was proper for the accomplishment of the object stated.

At the date of the subscription, the pertinent facts, as we gather them from the rather unsatisfactory printed case, were these: In 1866 the residents of Branchville desired to have the Sussex R. extended from Newton to that village, and the Sussex R. Co. had intimated its willingness, in case the entire right of

Facts at date of subscription.

way was secured free of incumbrance, and the road-bed was graded, to accept a conveyance thereof and issue a certain amount of its stock therefor, and then to complete and operate the extension; in order to carry out this scheme William H. Bell and James Roe made an arrangement with Armstrong, over whose land the proposed extension would lie, by which Armstrong executed and delivered to Bell a deed purporting to convey to the Sussex R. Co. in fee the right of way over his land, and Bell and Roe signed and gave to Armstrong a writing as follows:

"Memorandum of agreement between Obadiah P. Armstrong and the Sussex R. Co.

Whereas, The said Obadiah P. Armstrong this day conveyed by deed the right of way for the extension of the Sussex Railroad from Newton to Branchville across his lands; therefore the Sussex R. Co. agrees to pay the said Obadiah P. Armstrong, in consideration for said conveyance, the sum of \$3,000, on or before the first day of June, 1867.

"WILLIAM H. BELL, } Committee.
"JAMES ROE,

"Lafayette, October 11, 1866."

The Sussex R. Co. had not authorized Bell or Roe to enter into this arrangement on its behalf, nor does it appear even to have ratified or known of the same. Armstrong at the time had or soon afterward acquired an understanding of the true position occupied by the company and by Bell and Roe, but nevertheless permitted his deed to remain in the hands of Bell, expecting that it would be delivered to the company in furtherance of the proposed scheme, and resting content with the personal obligation incurred by Bell and Roe, by their executing without authority from the company the memorandum above recited. This posture of the affair continued until about April 8, 1870, when the Armstrong deed was delivered by Bell to the company and recorded upon the understanding that the company should issue its stock and complete and operate the extension. This understanding was afterward fulfilled. Armstrong has never claimed to hold the company responsible for the debt or to have any lien upon the land therefor.

The legitimate inference from these circumstances is that Armstrong empowered Bell to deliver to the company the deed

Right of way— which he had executed, for the purpose of conveying
Delivery of deed. to the company the right of way clear of all incumbrances, and accepted as full satisfaction for the purchase money the personal obligation of Bell and Roe, and that when such delivery was made the title was vested in the company free from any lien to the grantor.

It follows from this, that on April 27, 1870, when the document now in controversy was signed, the payment of Armstrong's debt was not at all required for the purpose of placing the railroad extension under the control of the company clear of incumbrance. Armstrong had ceased to have any right, legal or equitable, which he could set up to defeat or delay the execution of that purpose, and, so far as any claim of his was concerned, the purpose was already accomplished before the subscription was made.

Subscription
to pay off in-
cumbrances.

For this reason we think the complainant is not entitled to call the defendant to account for the fund subscribed, in order that it may be applied to the payment of this debt.

The decree for an account should be reversed.

Unanimously reversed.

Lien of Land-owner Conveying Right of Way.—See *Hall v. Chicago, etc., R. Co.*, 20 Am. & Eng. R. R. Cas. 341.

MORRILL *et al.*

v.

WABASH, ST. L. AND P. R. CO.

(*Missouri Supreme Court, November 12, 1888.*)

Railroad Companies—Deed to—Failure to Complete Road—Effect.—A deed to a railroad company organized under the laws of the state of Missouri does not become inoperative, by virtue of section 823 of the Revised Statutes of that state, because the road is not built the entire length of the charter route within the ten years prescribed by the statute.

Same—Condition Subsequent—What a Breach of.—When a deed to a railroad company, its successors and assigns, contains a stipulation that "The agreement is made for the location, construction and maintenance of said railroad, and for that use and purpose only; and that the license hereby granted is to operate in perpetuity if said company, its successors and assigns, shall continue to maintain and operate their railroad, and to cease with the non-use of the same for such purpose," there is no breach, of the conditions subsequent in the deed, by failure of the grantee or those succeeding to its title, to build and operate the road the full extent of the charter route.

APPEAL from St. Louis Circuit Court.

This was an action in ejectment by Mary E. Morrill and others, heirs of Robert Forsyth, deceased, against the Wabash, St. Louis & Pacific R. Co., for land in the city of St. Louis. Judgment was for the defendant, and plaintiffs appealed to the St.

Louis court of appeals, whence the case was transferred to the supreme court.

The facts are sufficiently set forth in the opinion.

M. L. Gray and *R. Hirszel* for appellants.

W. H. Blodgett and *Jos. Dickson* for respondent.

BLACK, J.—The plaintiffs, who are the heirs and devisees of Robert Forsyth, brought this action of ejectment to recover possession of a strip of land from 30 to 40 feet in width, extending from Union avenue to Forsyth junction, in the city of St.

Louis, a distance of about 3500 feet. The agreed facts are, in substance, these: On the 17th November, 1871, Robert Forsyth conveyed the strip of land in question, it being a part of a large tract, to the St. Louis County R. Co. for a right of way. This corporation was organized August 25, 1871, under the general laws of this state, to build and operate a railroad from the city of St. Louis to Creve Cœur creek, a distance of 16 miles. This company made its surveys and located its road, and filed a plat thereof according to law before April 15, 1872. It then took possession of the property in question as a part of its right of way, and between that date and November, 1873, expended some \$30,000 on its entire line in the construction of its railroad. Robert Forsyth was a director and a member of the executive committee during this time, and to his death, in November, 1873. This company became insolvent and unable to complete its road, and on August 11, 1875, conveyed the right of way in question to the St. Louis, Kansas City & Northern R. Co., a corporation operating a road from the Union depot, in St. Louis, to Kansas City. The last-named company took immediate possession of the strip of land in suit, completed a railroad thereon, and it and the present defendant have ever since owned and operated the same. In the same year, 1875, the heirs of Forsyth conveyed to the St. Louis, Kansas City & Northern R. Co. an additional strip, 15 feet in width. The last-named company and the present defendant were consolidated in 1879. The defendant's road extends westward from Forsyth junction to St. Charles, and thence to Kansas City; so that from Forsyth junction to Creve Cœur creek, a distance of 10 miles, no railroad has ever been constructed on the line of the St. Louis County R. On the 27th August, 1881, the plaintiffs served defendant with notice of re-entry and forfeiture, and then commenced this suit. They contend that the deed from their ancestor to the St. Louis County R. Co. became inoperative by force of section 823, Rev. St.; and also that there has been a breach of the conditions subsequent in that deed.

Section 823 provides that if any railroad company "shall not

finish its road and put it in operation, in 10 years from the time of filing its articles of association, its corporate existence and powers shall cease: provided, that, if a portion of their road shall be finished and in operation, they shall continue their corporate existence, with power to hold and manage the portion of their road so constructed, and for no other purpose." Suppose that under this statute the corporate powers of the St. Louis County R. Co. ceased because of its failure to complete and put in operation any part of the road within 10 years; that it thereby forfeited its franchise to be a corporation; and suppose, further that a decree of forfeiture had been duly proven;—still its unsold property would vest in the directors for the purpose of paying its debts, and for distribution among the stockholders. Section 744, Rev. St.; *McCoy v. Farmer*, 65 Mo. 244; *Powell v. Railroad Co.*, 42 Mo. 63. So, if its right of way, or any part thereof, has been sold before the forfeiture, the title to the part sold would not revert to the original grantor simply because the St. Louis County R. Co. had ceased to be a corporation. If the plaintiffs have any right to the possession of the property in suit, it is because there has been a breach of the conditions subsequent in the deed of their ancestor. The deed purports to be made "in consideration of the benefit and advantages arising from the location, construction, and operation of the St. Louis County R., and of the sum of one dollar;" and the conveyance is to the company, "its successors and assigns." The deed contains this additional stipulation: "This agreement is made for the location, construction, and maintenance of said railroad, and for that use and purpose only; and this license to operate in perpetuity if said railroad company, its successors and assigns, shall continue to maintain and operate their railroad, and to cease with the non-use of the same for such purpose." Now, we have seen that the St. Louis, Kansas City & Northern R. Co. built a railroad over the right of way to the Union depot in St. Louis, in 1875, three years after the date of the deed; and it and its successor have ever since operated the same. At the date of the deed from the St. Louis County R. Co. to the St. Louis, Kansas City & Northern R. Co., the title to the right of way was in the former company. The lines of the two companies connected at Forsyth junction. The power of the St. Louis County R. Co. to dispose of its right of way from there to the Union depot, six miles, for railroad purposes, is not disputed. It follows that the only possible ground upon which plaintiffs can succeed is that the conditions call for the construction and operation of a railroad also from Forsyth junction to Creve Cœur creek; and that the construction and operation of a road over the six miles is not a

Forfeiture for failure to build road—Reversion to grantor.

Deed to company—Building of road.

compliance with them. In making this claim, the plaintiffs contend the deed must be read in the light of the law which constituted the charter of the St. Louis County R. Co. Let this be conceded. Then it appears that company could have built the six miles only, and, if it had done no more, it would still be a corporation as to that six miles, even as against the state, and would have been and continued to be the rightful owner of the right of way in question. If that company could retain the right of way in question with only six miles of its road constructed, no reason is seen why the defendant may not do the same.

Again, conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates. 4 Kent Comm. (10th Ed.) 150. When relied on to work a forfeiture, they must be created in express terms or by clear implication. 1 Washb. Real Prop. (3d Ed.) 469. Keeping these rules in view, we are of the opinion that this deed cannot be construed as upon a condition that the road shall be built for the entire charter route of the grantee. No such a condition is created in express terms, nor does it appear by clear implication. The fair construction of the deed is that the property conveyed must be used for the construction and operation of a railroad thereon. This deed is not unlike those generally used for granting a right of way to railroad companies; and we are not cited to nor are we aware of any adjudicated case which would give to this deed the construction contended for by the plaintiffs. Our conclusion is that the conditions in this deed have been performed by the grantee of the St. Louis County R. Co., and that the plaintiffs have not shown any right whatever to the possession of the property in question; and the judgment is affirmed.

RAY, J., absent. The other judges concur.

Conditional Conveyances of Right of Way—Construction of Road.—See Thornton v. Sheffield & B. R. Co., 33 Am. & Eng. R. R. Cas. 227, note 231.

Same—Change of Route—Contract to Build Road Not Specifically Enforceable.—A writing executed by the complainant with the Chesapeake & Ohio R., and professing to convey, for a valuable consideration, certain lots of the complainant, through which the said company's railroad was expected to be built, and containing a clause that such grant was on the condition that, in the event the property so conveyed should cease to be used for railroad purposes by the company, its successors or assigns, the estate thereby granted should revert to the grantor, his heirs or assigns: containing also a covenant that the complainant should have leave to connect a single branch with the track of the railroad at a point near the complainant's hotel, and that the company would erect lawful fences and protect said track,—does not constitute a contract on the part of the company to build its road along and through said lots, which can be enforced

by a bill for specific performance. Such contract, as well as the law, contemplates the right of the railroad company to change its route before being built, and to abandon it afterwards; and if the complainant is injured thereby, his remedy is by action at law. *Hoard v. Chesapeake & O R. Co.*, 123 U. S. 222.

DENVER AND RIO,GRANDE R. CO.

v.

UNITED STATES. (Two cases.)

(*U. S. Circuit Court, District of Colorado, May 10, 1888.*)

Railroad Company—License to Cut Timber from Public Lands.—The special act of June 8, 1872, and an act of March 3, 1875, amendatory thereof, and the general act of March 3, 1875, authorize the Denver & Rio Grande R. Co. to take timber from public lands adjacent to the line of said railway, whether built prior or subsequent to June 8, 1882, and to use the same in the construction of the road.

Same—Construction of Grant.—Under the special acts no timber could be taken from land adjacent to that portion of the road completed prior to June 8, 1882, for repairs upon the line constructed subsequent thereto.

Same—Timber Cut for Repair.—Timber taken from lands adjacent to that portion of the line constructed subsequent to June 8, 1882, could not lawfully be used to repair the portion of the road constructed prior to that date.

Same—What in Purview of Act.—Depot-houses, snow-sheds, and fences are to be considered in the purview of the acts, as part of the railroads.

ACTION against the Denver & Rio Grande R. Co. and others, defendants, in two suits, for illegally cutting timber on the public lands. Judgments for plaintiff, and defendants bring error. Both suits were consolidated. The facts are set forth in the opinion.

H. W. Hobson, U. S. Atty., for defendant.

BREWER, C.J.—These two cases come here on error from the district court, judgments having been rendered there in favor of the United States and against the plaintiff in error, for the full amounts claimed. Each case was tried Case stated—
Statutory provisions. on an agreed statement of facts. On June 8, 1872, congress passed an act making a grant to the Denver & Rio Grande R. Co. 17 U. S. St. at Large, 339. The material portion of that grant is as follows:

“That the right of way over the public domain, one hundred feet in width on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops,

and other buildings for railroad purposes, and for yard-room and side tracks, not exceeding twenty acres at any one station, and not more than one station in every ten miles, and the right to take from the public lands adjacent thereto stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line, be and the same are hereby granted and confirmed unto the Denver & Rio Grande R. Co., a coporation created under the incorporation laws of the territory of Colorado, its successors and assigns: . . . provided, that said company shall complete its railway to a point on the Rio Grande as far south as Santa Fe within five years of the passage of this act, and shall complete fifty miles additional south of said point in each year thereafter; and in default thereof, the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road."

Subsequently the proviso was changed so as to give ten years instead of five. 19 U. S. St. at Large, 405. On March 3, 1875, congress passed an act making a general grant "to any railroad company duly organized under the laws of any state or territory," etc., which grant, for all questions that arise in this case, is similar to the special grant to the Denver & Rio Grande except that in the general grant the right to take material, earth, stone, and timber is limited to what may be necessary for the construction, and not, as in the special grant, for construction and repairs.

The agreed statement of facts in the first case is as follows:

Agreed statement of facts.

That it is agreed: First. That the timber sued for in said action was cut by William A. Eckerly & Co., as agents for the Denver & Rio Grande R. Co., and delivered to said railway company. Second. That the attached statement correctly shows the kind and amounts of timber so cut and delivered, and also shows the time of cutting, the purposes for which it was cut and used, and the prices paid for cutting and delivering the same. Third. That said timber was cut in Montrose county, Colo., and near the town of Montrose, and upon public, unoccupied, and unentered lands of the United States. Fourth. That the lands from which the timber was cut were along and near and adjacent to the line of railway of said company. Fifth. That the portion of the line of railway through said county of Montrose, and in the vicinity of said town of Montrose, was not constructed or completed until after June 8, 1882; and that on June 8, 1882, said line of railway was only constructed and completed as far westward as Cebolla, in Gunnison county, Colo. Sixth. That said company had not completed its line of railway to Santa Fe on June 8, 1882, nor has it ever so completed it. Seventh. That of the timber cut as aforesaid, a part was used on portions of the line of railway out

to Grand Junction, constructed and completed after June 8, 1882, and for the purpose of construction of railway, erection of section and depot houses, snow-sheds, fences, etc.; and a part was shipped by the Denver & Rio Grande R., for similar purposes, to the Denver & Rio Grande Western R., to be used in the territory of Utah, as shown in attached statement; and \$1000 worth was used for repairs on portions of road completed prior to June 8, 1882. Eighth. That as to all of its line of railway constructed after June 8, 1882, the said company strictly complied with all the requirements of the act of congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." Ninth. That upon the foregoing agreed statement of facts, the following questions are to be submitted to the court for decision: (a) Whether, under the act of June 8, 1872, and an act of March 3, 1877, amendatory thereof, the Denver & Rio Grande R. Co. had a right to cut timber for any purposes on public land of the United States adjacent to portions of its line of railway constructed and completed after June 8, 1882. (b) What are "adjacent" lands, within the meaning of the act of congress approved June 8, 1872, entitled "An act granting the right of way through the public lands to the Denver & Rio Grande R. Co.," and the act of congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States?" (c) Whether, under said acts, said company could cut timber on public lands of the United States adjacent to the portions of the line of railway completed subsequently to June 8, 1882, to be used for purposes of repair, and for station and section houses, and for fences and snow-sheds on those portions of said railway line constructed and completed prior to June 8, 1882. (d) Whether, under such statutes, said railway company could cut timber from public lands adjacent to portions of the line of railway completed after June 8, 1882, to be used for any purposes on portions of the line of railway constructed and completed after June 8, 1882; and, if so, for what purposes. (e) Whether the terms of the statute giving said railway company the right to take timber "for the construction and repair of its railway lines" would in anywise comprise and comprehend the erection, building, and repair of section and depot houses, snow-sheds, fences, and rolling-stock. (f) Had the said railway company the right, under the act of March 3, 1875, to take, from adjacent public land, material, earth, stone, and timber necessary for the construction of its railroad? (g) To what extent and for what amount the Denver & Rio Grande R. Co. is responsible for timber cut as aforesaid and shipped to Utah for use on the Denver & Rio Grande Western R. (h) To what extent and for what amount said railway company is liable, if at all upon the

above agreed statement of facts, and upon the law, as it shall be decided by the court. Tenth. That this case is a test case to obtain a definite and positive adjudication, by a court of competent jurisdiction, of the various points set out above, and of the rights of said railway company, with regard to cutting timber from public lands, under the act of June 8, 1872, under the amendatory act of March 3, 1877, and under the act of March 3, 1875. Eleventh. That judgment shall be entered by the court upon the foregoing statement of facts, and upon the law as it shall decide it, and at a valuation for said timber as set out in the annexed statement. Twelfth. That the admissions made in this statement of facts shall bind the parties hereto only for this suit, and shall not bind them as to any other matter or case.

There is some dispute between counsel as to the questions that are involved in and presented by these facts. I shall not attempt to consider any that I do not think are fairly and clearly presented by the facts. The fourth paragraph stipulates that the lands from which the timber was cut were adjacent to the line of railway; hence I shall not stop to consider how near land must be to be adjacent,—whether half a mile or ten miles. I certainly do not agree with the idea, which seems to be expressed elsewhere, that the proximity of the lands is immaterial, or that congress intended to grant anything like a general right to take timber from public land where it was most convenient. The grant was limited to adjacent lands, and I do not appreciate the logic which concludes that, if there be no timber on adjacent lands, the grant reaches out and justifies the taking of timber from distant lands,—lands fifty or a hundred miles away; nor do I understand that the rule controlling the construction of ordinary public grants, to the effect that they are construed strictly against the grantee, does not apply to these grants.

The first question is whether the railroad company can avail itself of both the special act of 1872 and the general grant of 1875. It was held by the district judge that it could, and I agree with him in that conclusion. It is unnecessary to do more than refer to the opinion filed by my Brother Hallett for sufficient reasons for his conclusion. The principal question, however, is this: My Brother Hallett was of the opinion that the place of use of the timber on the line of the railway was to be considered as well as the place of cutting, in determining the rightfulness of the appropriation by the company. He thought that the right to cut timber extended to only so much timber as should be used in the construction of the road opposite, or nearly so, to the place of cutting; that if timber should be cut within a half mile of the road, and then carried on the cars of the company a hundred miles,

“Adjacent
lands,” mean-
ing of.

Place of use of
timber.

and there used in the construction of the road, it could not be said to be taken, within the purview of the act, from adjacent lands. So he concluded that the right to take timber was limited by the place of use, and that, as each section of the road of reasonable length was completed, the right to take timber on lands adjoining such section was gone. In other words, the grant of timber was exhausted *pari passu* with the construction of the road. In this view, with all deference to the learned judge, I think he was mistaken. While grants of this nature are to be strictly construed, they are to be fairly construed, and so as to carry into effect the intent of the grantor. In determining what is granted, we of course look first to the language used. Now, in these grants the place of cutting, as well as the use to which the timber cut may be put, are both expressed. The place is the public lands adjacent to the line of the road. The use is the construction of the railroad, not a part of the railroad, but of the railroad as a whole, and of course including therein every part of it. It does not purport to grant the right to take timber from adjacent public lands for use in the construction of the railroad opposite the place of cutting, and these last words will have to be implied in order to place the limit on the grant given to it by the district judge. It would have been so easy to use such words of limitation that their omission makes strongly against an intent of such limitation. Let me make an illustration. Suppose the owner of a section of land made a grant to a railroad company of a strip 50 feet in width through his land for a right of way, and by the same instrument granted to the company the right to take stone and earth from land near this right of way for the purpose of constructing its road. This would be precisely parallel to the case at bar, the difference being only one of size. Now, would it be contended that under such a grant the company was limited for each rod of distance to the stone and earth which might happen to be opposite such rod? Would not a fair and reasonable construction, one expressing the intent of the grantor, be that the company could take stone and earth from any place which was near to the right of way for use in the construction of any part of the road through the section? If that would be true in the lesser illustration, would it not also be true in the larger case before us? Can it be that congress intended to aid in the construction of only a part of the railroad? It must have known that there were large extents of territory in this western country treeless, and without suitable stone for culverts and bridges. Did it mean to aid in the construction of such parts of the road as ran through a timber country, or where there was suitable stone, and leave the company unaided in the construction of other parts? It seems to me, both the language of the statute and the intent of the

grantor are against the views entertained by my Brother Hallett. But, beyond this, the decision of the supreme court in the case of *U. S. v. Railroad Co.*, 98 U. S. 334, seems to me decisively against those views. In that case the facts

Decision of
U. S. supreme
court.

were these: By the nineteenth section of the act of July 2, 1864, there was granted to the railroad company, for the purpose of aiding in the construction of its road, every alternate section of public land (except mineral land) designated by odd numbers, to the amount of 10 alternate sections per mile on each side of the road on the line thereof not reserved, etc. By the twentieth section, whenever 20 consecutive miles were completed and accepted, patents were to be issued to the company for land on each side of the road to the amount designated. It was contended that this grant was to be measured by the separate sections of 20 miles of road, and that, to fill out the grant, land must be taken opposite each section, respectively. But the court ruled otherwise, and held that the grant was in aid of the construction of the road as a whole, and might be filled out by lands anywhere along the line. I quote the language of the opinion:

"The position that the grant was in aid of the construction of each section of twenty miles, taken separately, and must be limited to land directly opposite to the section, is equally untenable. The grant was to aid in the construction of the entire road, and not merely a portion of it, though the company was not to receive patents for any land except as each twenty miles were completed. The provision allowing it to obtain a patent then was intended for its aid. It was not required to take it; it was optional for it then, or to wait until the completion of other sections or of the entire road. The grant was of a quantity of land on each side of the road, the amount being designated at so many sections per mile, with a privilege to receive a patent for land opposite that portion constructed, as often as each section of twenty miles was completed. If this privilege were not claimed, the land could be selected along the whole line of the road without reference to any particular section of twenty miles. When lateral limits are assigned to a grant, the land within them must, of course, be exhausted before land for any deficiency can be taken elsewhere; and, when no lateral limits are assigned, the land department of the government, in supervising the execution of the act of congress, should undoubtedly as a general rule, require the land to be taken opposite to each section; but in some instances good reasons may exist why a selection elsewhere ought to be permitted. If, as in the present case, by its neglect for years to withdraw from sale land beyond twenty miles from the road, the land opposite to any section of the road has been taken up by others, and patented to them,

there can be no just objection to allowing the grant to the company to be satisfied by land situated elsewhere along the general line of the road."

This sustains me in the construction I place upon these grants, that only two things are necessary in determining the rightfulness of the appropriation of timber—First, that it be taken from public lands adjacent to the line of road; and, second, that it be used in the construction of the road. This disposes of substantially all the questions in the case. One or two minor matters remain for notice.

As appears from the agreed statement of facts, a part of the road was completed before June 8, 1882, the time limited by the special act and its amendment; and a portion has been constructed since. For convenience I shall call the first part the old line, and the latter part the new line. Now, the special right given by the special act—that is, the right to take timber for repairs—is by the proviso specifically limited to the old line, so that no timber can be taken from lands adjacent to it for repairs on the new line, and, conversely, none from land adjacent to the new line for repairs on the old. Again, for the rights granted under the general act, both the old and the new lines are to be taken as parts of one road, so that timber can be taken from any part of the entire line for the construction of any part of the road provided for in the original organization. Again, I think there can be no doubt that section and depot houses, snow-sheds, and fences are properly to be considered, in the purview of the act, a part of the railroad:

Right to take timber for repairs—Old and new lines.

I have not hitherto noticed the agreed statement of facts in the second case, for the matters that I have been considering dispose of every question in that case except that which arises upon the eighth paragraph, which is "that one-fourth of said timber has been used in the construction of new switches and side tracks along the line of road completed subsequent to June 8, 1882;" and that presents the question whether this timber was used in the construction of the railway. On the one side it is claimed that this refers to repairs, new switches, etc., being in lieu of old switches, etc. On the other hand, it is claimed that this means absolutely new switches, etc.; that is, switches, etc., where there were none before. I think it immaterial which is the meaning. Of course, if repairs, it was unlawful, because upon the new line; and if, on the other hand, absolutely new switches and side tracks, they were upon a line of road already completed, so that they were merely additions, extensions, and improvements. The grant does not extend to these matters, but is exhausted when the line is once completed. Of course

Construction of "new switches" and side tracks.

we all know that the developments of the country and increase of business will require constant additions; new depots, section-houses, switches, and side tracks. The demand for these will never be exhausted, but will continue as long as the surrounding country increases in population and business. Now, the grant was not intended to aid in supplying these successive demands. It was to aid in the first construction, and when that was completed the grant was exhausted. So, in either event, this appropriation of timber was unlawful.

Of course the supply of timber for other roads was not within the contemplation of the act.

This disposes of all questions in the case. From the views above expressed, it follows that the judgment of the district court in each case must be modified. In the first case judgment will be entered in favor of the government for the amount of timber shipped to the Utah lines, and for the \$1000 worth of timber cut on land adjacent to the new lines for repairs on the old; and in the second place judgment will be for the one-fourth which was used in the construction of new switches and side tracks.

BACKUS

v.

DETROIT, WESTERN TRANSIT AND JUNCTION R. CO. *et al.*

(*Michigan Supreme Court, October 19, 1888.*)

Railroad Companies—Lease—Consolidation—Unauthorized use of Right of Way—Damages.—Where a depot company, having agreed to build tracks and terminal facilities, and to lease their use to a railroad company, to be enjoyed by it as owner, afterwards enters into an agreement with another company upon such terms and conditions as to have the effect of consolidation as to liability to third parties for the unlawful use of their property in the operation of the road, that the latter company shall obtain the right of way, and build the tracks, which it does; the petition in the condemnation proceedings stating that the land is to be used only for the passage of trains, and not for switching or making up trains, both the depot and construction companies are liable for damages sustained by one whose land was condemned, by reason of the switching and making up of trains by the lessee company.

ERROR to Circuit Court, Wayne County.

Action for trespass brought by A. Backus, Jr. & Sons, a corporation, against the Detroit Western Transit & Junction R. Co., the Wabash, St. Louis & Pacific R. Co., and the Detroit Union

Railroad Depot & Station Co. On the trial plaintiff discontinued as to the Wabash Co., and brings error from a judgment in favor of the defendants.

F. A. Baker (*E. G. Stevenson* of counsel) for appellant.

Charles M. Swift (*Otto Kirchner*, of counsel) for appellees.

SHERWOOD, C. J.—The plaintiff brought an action on the case against the above-named defendants, and also against the Wabash, St. Louis & Pacific R. Co., to recover damage for the unlawful and wrongful use of the plaintiff's land in the city of Detroit, over a part of which the defendants, for certain purposes, had a right of way for their engines and cars to pass over, and for no other purpose, and by which wrongful use the plaintiff claims to have been damaged in the use of its premises, and in the enjoyment of the same, to its great injury. Plaintiff also claims in its declaration that by defendants' wrongful use of its premises and said right of way it was obliged to hire persons to protect its property, which consisted of a factory and large accumulations of lumber and material, from fire proceeding from engines wrongfully used on such right of way, in switching and making up trains thereon, greatly to its damage. Also, by such wrongful use of such premises, a large quantity of lumber standing on plaintiff's property was covered, and the fibres thereof filled with soot and cinders escaping from the engines, and scattered through the piles, which became saturated with coal dust, and was greatly injured thereby for the purposes for which it was used, and by reason of the unlawful use of the said right of way, and the danger caused thereby from fire, the plaintiff's rates of insurance have been greatly increased, and its rented premises adjoining have been greatly injured by said unlawful use, consisting as it does of a wharf and lumber-yard. And plaintiff claims as its damage for its said several injuries the sum of \$100,000 in its declaration. To the plaintiff's declaration the defendants pleaded the general issue. The plaintiff discontinued on the trial as to the Wabash road. The case was tried in the Wayne circuit court before Judge Brevoort, by jury. At the close of the trial the circuit judge directed the jury to render a verdict for the defendants, and plaintiff brings error.

Case
stated.

But two errors are assigned: First. "The court erred in refusing to receive evidence tending to show the nature and extent of the damages suffered by plaintiff at the hands of the defendants. Second. That the court erred in directing the verdict for the defendants." There can be no doubt but that the plaintiff's declaration states a cause of action, which, if proved, would entitle it to recover damages. If there is any proof legally in the case tend-

Errors as-
signed—Ques-
tions arising.

ing to show the facts set out in the declaration there must be a reversal ; and beyond this there is no other question before us for consideration, except, perhaps, it may be whether or not legal proof was offered and rejected by the court to prove such facts.

The defendant the Detroit Union Railroad Depot & Station Co. was organized June 10, 1881. It acquired the land lying between Woodridge street west, in Detroit, and the Detroit

Further facts. river, and extending from the grounds of the Michigan Central R., at Twelfth street, on the east line, to the property of the plaintiff. The original and amended articles of association express the intention of the corporation to construct railroad tracks from the station grounds so acquired, to the junction of the Wabash, St. Louis and Pacific R., with the Lake Shore & Michigan Southern R., in the township of Spring wells, and to there connect with the Wabash, St. Louis & Pacific road. On the 20th day of October, 1881, the Detroit Union Railroad Depot & Station Co. entered into a contract with the Wabash, St. Louis & Pacific R. Co. of the second part, whereby the Union Depot Co. agreed to furnish the Wabash road with terminal facilities on said station grounds, the exact nature of which, and of the accommodations and facilities it is unnecessary here to state. The instrument is called by the makers a "lease" or "demise." In substance, however, it is a contract by which the grounds, buildings, and tracks are to be used in common by both roads, and such other roads as might thereafter see fit to join them, intending a union depot in the future, evidently. Some of the provisions of this contract are: "That the tracks constituting the railroad yard on said grounds should be constructed by the Union Depot Co. for the Wabash road, and on such a plan and in such a manner as would be satisfactory to it." A map is referred to in the contract and annexed to it, showing the general plan of the tracks or yard that had been agreed upon, and to which express reference is frequently made. Thus: The passenger-house and the tracks leading thereto are mentioned as follows: "Also the right to use jointly with other railroad companies the proposed passenger-house to be built upon the grounds of said first party, and the tracks leading thereto, or rather, two southerly tracks leading thereto, as indicated on the map attached hereto, and including a strip of land," etc. A reservation is made of a strip 400 feet by 100 feet for an elevator "about as indicated on said map." A reservation is also made of "a space for a double track to and from said elevator, about as indicated on said map." And said first party agrees "to obtain the right of way from the westerly boundary of said station grounds, wide enough for four tracks, in as direct a line as is practically consistent with economy, to or near the point where the right of way of the party of the second part from the west ap-

proaches and touches and becomes parallel with the right of way of the railroad owned by the Lake Shore & Michigan Southern R. Co. in fee simple ownership, and lease the same to the said second party subject to the reservations herein made. And the said first party agrees to build upon such right of way a railway track or tracks from the point of junction with the railroad of said second party, at or near said points where said rights of way come together, single or double, as the said second party shall desire, to said station grounds," etc. That the rent shall be the interest at 7 per cent on the cost of the grounds, right of way, and the improvements, or a *pro rata* part thereof, as particularly described, and that the lease shall be a perpetual one. That the rights of occupancy to be enjoyed by the Wabash shall be that of an owner. This intention is expressed as follows: "And the said parties agree that when the property is ready for use and the improvements, tracks, station-houses, and other necessary buildings and erections are once complete, then and thereafter the said second party shall have the full and complete use of the same, and shall as absolutely control and manage the same as if the owner thereof," etc.

The defendant the Detroit Western Transit & Junction R. Co. was organized May 2, 1881. On the 12th day of April, 1882, the location was fixed as follows: "Beginning at such point as shall be found most desirable on the east line of water lot ten, on the Thompson farm, so called, and between Woodbridge street and the Detroit river, in the city of Detroit, in the county of Wayne, Mich., and running thence in a direction southerly and westerly on such line as shall be found most convenient and practicable to and into the town of Springwells in said county, until said line shall intersect the railroad of the Wabash, St. Louis & Pacific R. Co., to some convenient point near the crossing of the Dearborn road, so called, and between said crossing and the river Rouge in said town of Springwells, all of said railway of this company being in said county of Wayne, and the entire length thereof being about four miles, as is estimated." On the date last mentioned the Detroit Western Transit & Junction R. Co., as the party of the first part, entered into a contract with the Detroit Union Depot & Station Co., as the party of the second part, by which the Union Depot Co. agreed to furnish and advance to the Western Transit all the money necessary to acquire its right of way, and to construct its railroad, and in consideration thereof the Western Transit leased the whole to thing to the Union Depot Co. forever, at an annual rental equal to the interest on the money so furnished and advanced. The Western Transit agreed to keep up its organization and preserve its franchises, and use them for the condemnation of a right of way. It also agreed if desired to issue its capital stock to the

Union Depot Co. to the amount of said debt, so that the Union Depot Co. should "thus become the holder of its stock, and also through it the absolute owner of the property represented by it, and from that time to manage it as such owner." In addition to furnishing and advancing all the money needed, the Union Depot Co. agreed as follows: "And the said second party agrees to provide for the working and management of the said railroad and branches, and to maintain the same and all necessary structures and fences thereon, and to assume all the responsibilities of such management, and to indemnify and save harmless the said first party from and against all and every kind of liability which may arise or grow out of the management and operation of said road and branches." With these contracts and agreements referred to existing between these parties defendants, the Detroit Western Transit & Junction Co., in July, 1882, took proceedings to condemn and acquire the right of way across the land known as the "Backus Property," lying immediately west of the Union Depot grounds. This property has a frontage of about 400 feet on the Detroit river, and extends from the river to Woodbridge street. The petition described a piece of land across the property 60 feet wide, as the parcel sought to be acquired as a right of way, and it contains the following clause: "The right of way hereby sought is sought and to be used only for the passage of trains, and not for the switching and making up trains." The strip was condemned under this petition. There was a slight change made from the line condemned, agreed upon by the parties, and the parties conveyed to the company the land by deed containing the following clause: "The right of way hereby conveyed is to be used only for the passage of trains, and not for the switching or making up of trains, and is to be subject to the right of the owners, A. Backus, Jr., and those claiming under him, to have convenient crossing over said railroad provided and maintained by said railroad company." The Union Depot Co. immediately went on and constructed their railroad until it connected with the Wabash road, as agreed upon, and the evidence tends to show it carried out its agreement with the Western Transit Co., and when the road was done and the depot completed, they commenced to operate the road. The Wabash took it immediately as soon as it was ready, and have done switching and making up trains on the Backus ground ever since. It appears the firm of A. Backus, Jr., & Sons occupied the Backus property prior to the condemnation proceedings, and held a lease of the same. This firm, July 31, 1885, was organized as a corporation, and on the 1st day of August of that year the firm assigned all of its assets and claims to the plaintiff.

There can be no question, we think, under the foregoing facts,

of the plaintiff's right to bring suit if it has a cause of action, or if the firm had a cause of action against the defendants. There was testimony showing or tending to prove all the foregoing facts stated. It also appeared that the plaintiff had objected to and remonstrated with the defendants against the illegal use claimed to have been made of the right of way over the Backus ground, but without avail. As early as May 14, 1885, the plaintiff's assignor called attention to this subject in the following letter: "May 14, 1885. *Hon. James F. Joy, Prest. Transit Co.*—DEAR SIR: My attention has been called repeatedly to the violation of A. Backus, Jr., & Sons' rights by the constant switching and making up of trains across their yard and 18½ street, and your attention has been called to the subject repeatedly, with the request that the obstructions might be removed. My deed for right of way for through trains is ample to cover your rights, and will be respected, but this switching of cars across above premises must come to a stop, or I shall insist on knowing why, and shall take steps to protect my rights. Your immediate attention to above complaint will save much trouble. Yours respectfully, A. BACKUS, Jr." It appears from the testimony that Mr. Joy, who was president of the Union Depot Company, and the firm of A. Backus, Jr., & Sons, understood the rights secured in the Backus property and the use to be made of it alike, and that switching cars and making up trains of cars were not to be done there; and it further appears that when the lease was given to the Wabash road Mr. Joy informed that road of the manner in which it could do business over the Backus grounds; that the agreement with Mr. Backus was that no switching should be done upon these grounds or making up trains, and Mr. Joy says, "I felt that we never acquired the right of way for it." I do not think it would be questioned, had the depot company used its tracks in the manner the testimony tends to show they were used by its lessees, but that it would be liable to the plaintiff or its assignor. At least I do not think it could be contended otherwise.

Illegal use of
right of way
—Remon-
strances.

The depot company could not so lease or transfer its interest under its franchises as to rid itself of its liability to the plaintiff for the improper use of them, and when the transit company made its arrangement with the depot company it seemed to understand this, and had inserted in the agreement a clause making the latter assume all the responsibility of the management of its property, and to save the transit company harmless against all liability arising out of such management and the operation of its road. The agreement between the two companies was such, however, as to have the effect of consolidation as to the liability

Lease by depot
company so as
to get rid of
liability.

to third parties for the unlawful use of their property in the operation of their road, for damages consequent thereon, and they were liable also for such damage as was done to third parties by the unlawful use of the right of way allowed by them to be done by lessees or other persons. Otherwise all responsibility for such damage could be avoided, when an enterprise of doubtful success was about to be undertaken, by a simple transfer of the use of the property to parties who were insolvent until the result of the enterprise could be determined. The law did not intend this, and it should not receive such a construction or application. I think in these views we are sustained, not only by reason, but by the authorities, so far as we have any. *Nelson v. Railroad Co.*, 26 Vt. 717; *Railroad Co. v. Dunbar*, 20 Ill. 623; *Railroad Co. v. Brown*, 17 Wall. 445. In this case it is said: "The operation of the road by the lessee does not change the relations of the original company to the public." *Abbott v. Railroad Co.*, 80 N. Y. 27; *Railroad Co. v. Mayes*, 49 Ga. 355; *Whitney v. Railroad Co.*, 44 Me. 362; *Stearns v. Railroad Co.*, 46 Me. 95; *Singleton v. Railroad Co.*, 70 Ga. 464; *Railroad Co. v. Morris*, 68 Tex. 49; *Lakin v. Railroad Co.*, 13 Or. 436; *Freeman v. Railroad Co.*, 28 Minn. 443; s. c., 34 Am. & Eng. R. R. Cas. 500; *Railroad Co. v. Curl*, 28 Kan. 622; *Railroad Co. v. Hambleton*, 14 Am. & Eng. R. R. Cas. 126; 1 Redf. R. R. 616; *McMillan v. Railroad Co.*, 16 Mich. 102. The plaintiff has shown by his proofs the unlawful use of its property by the defendants, and when it undertook to show its damages, the court refused to allow it to do so, and directed the verdict and judgment for the defendants. In this he erred, and the judgment must be set aside, and a new trial ordered.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred. LONG, J., did not sit.

When Lease of Road Absolves Company Owning it From Liability.—See *International, etc., R. Co. v. Moody*, 35 Am. & Eng. R. R. Cas. 607; *International, etc., R. Co. v. Underwood*, 34 Ib. 570; notes 32 Ib. 410, 411, 412; *Palmer v. Utah & N. R. Co.*, next case, and note.

PALMER *et al.*

v.

UTAH AND NORTHERN R. CO.

(Idaho Supreme Court, February 8, 1888.)

Railroad Companies—Liability for Negligence—Lease to Another Company.—A railroad company cannot avoid the responsibility of operating its road by allowing others to have the control and management of its road-bed or trains without the consent of the power whence it derives its franchise.

APPEAL from District Court, Bingham County.

Action by Linnie M. Palmer and Alfred Merle Palmer, by W. F. Fisher, his guardian *ad litem*, against the Utah & Northern R. Co., to recover damages for the death of William O. Palmer. Defendant appeals from verdict and judgment for plaintiff.

P. L. Williams and *W. H. Savage* for appellant.

Smith & Wright, H. M. Bennett, and James H. Hawley for respondent.

BUCK, J.—This is an action brought by the plaintiff to recover damages for the death of William O. Palmer, alleged to have been killed in Bingham county, on the eleventh day of December, A.D. 1885, through the negligence of the defendant in operating the train upon which deceased was riding at the time of his death. The cause was first tried in 1886, and on appeal to this court a new trial was granted. It was tried a second time, at the May term, 1887, and verdict rendered for the plaintiffs for damages in the sum of \$16,702.85 and costs, which was reduced to \$10,000 by the court as a condition upon which the motion for new trial was overruled. It now comes up on appeal from the order overruling defendant's motion for a new trial for errors occurring on the second trial. Facts.

The appellant assigns six errors in his brief, upon which he relies: (1) In overruling defendant's demurrer to the second amended complaint; (2) the refusal of the court to allow the defendant to amend its answer; (3) excessive damages appearing to have been given under the influence of passion or prejudice; (4) insufficiency of the evidence to justify the verdict; (5) that the verdict was against law; (6) errors in law occurring at the trial and specified in the assignment of errors. Assignment of errors.

The order of the court in overruling the defendant's demurrer to the second amended complaint was considered on the former appeal of this case, reported in 13 Pac. Rep. 425, and sustained, and the ruling thereon becomes the law of this case. 2 Hayne New Trial, § 291; Phelan *v.* San Francisco, 20 Cal. 40; Davidson *v.* Dallas, 15 Cal. 82; *Ex parte* Sibbald, 12 Pet. 491; Bridge Co. *v.* Stewart, 3 How. 413; Supervisors *v.* Kennicott, 94 U. S. 498; The Lady Pike, 96 U. S. 462.

The second error assigned is the overruling of defendant's motion to amend its answer after a new trial had been granted.

**Motion to
amend answer
after granting
new trial.**

Amendments to pleadings rest largely in the discretion of the court; and rulings thereon by the trial court will not be disturbed on appeal except it appear that the exercise of such discretion has deprived the party complaining of some substantial right. It has been held that such amendments should not be allowed after a new trial has been granted, (Bliss, Code. Pl. § 430; Spanagel *v.* Reay, 47 Cal. 608), nor when the amendments offered denies matters before admitted by the pleadings to be true. Bliss Code Pl. § 430; Harrison's Adm'rs *v.* Hastings, 28 Mo. 346.

The complaint alleges that the defendant owned and operated its railroad and was a common carrier of passengers at the time the deceased was killed. This was not denied in the

**Same—Respon-
sibility of op-
erating road
not shifted.**

answer, and was therefore admitted and taken as true upon the first trial. The amended answer refused by the court denies that the defendant was operating said road or was a common carrier of passengers, and alleges that said road and trains upon it were operated by another company, to wit, the Union Pacific R. Co. The refusal of the court to allow the amendment is clearly sustained by the authorities above cited. An inspection of the proposed amended answer, however, sustains the ruling of the court upon the additional ground that it set up no defence to the action. Whether it was intended to set up matter in avoidance of facts alleged in the complaint and not denied in the answer, or to deny such facts and to set up a new defence, is not clear. The purpose seems to have been to set up new matter which would shift the responsibility of operating the defendant's road from the defendant to the Union Pacific R. Co., who are alleged therein to have been in the exclusive possession of defendant's road, and the owners of and operating the train upon which deceased was riding at the time of the accident resulting in his death. The amended answer does not explain the relation existing between defendant and the Union Pacific R. It simply alleges that said Union Pacific R. was at the time and since in the exclusive possession of its roads, and operating its trains. All that is set up in the said amended answer might be true, and yet the Union

Pacific R. be but the employee of defendant. In either event, we think the defendant could not so shift the responsibility of operating the road without the consent of the power whence it obtained its franchise; and as no such consent was alleged, the proposed amended answer set up no defence to the action, and the motion to file the same was properly denied. *Abbott v. Railroad Co.*, 80 N. Y. 27; *Railroad v. Mayes*, 49 Ga. 355; 15 Am. Rep. 678; *Railroad Co. v. Brown*, 17 Wall. 445; 2 Ror. R. R. 1115, § 22.

The third point made by appellant is that the damages allowed by the jury were excessive, appearing to have been given under the influence of passion and prejudice. Other assignments. Our Code, section 142, provides that in actions of this nature "such damages may be given as under all the circumstances of the case may be just."

The fourth alleged error urged by appellant is that the evidence is insufficient to sustain the verdict. An examination of the evidence fails to convince the court that either the third or fourth assignment of error is well taken.

The fifth error assigned by appellant is that the verdict is against law; and the sixth errors of the court occurring on the trial.

It is urged under these two points that the jury disregarded the instructions of the court in finding the damages given the plaintiffs, and that the court erred in its ruling as to the admission of evidence and as to the amendments of the pleadings. The ruling as to the pleadings, we have already considered. We have carefully examined the instructions of the court and the rulings as to the admission of evidence, and find no error.

No error appearing on the record, the judgment is affirmed.

HAYS, C.J., and BRODERICK, J., concurring.

Railroad Companies—Liabilities—Lease of Road to Another.—It is held, by the supreme court of South Carolina, in the case of *Harmon v. Columbia & G. R. Co.* (S. C.), 5 S. E. Rep. 835, that a railroad corporation is not relieved, from the obligations imposed by its charter, by the lease of its road to another company. The court say:

"When a railroad company accepts a charter, it assumes the performance of all the duties to the public which are imposed upon it by the charter or the general laws of the state, and it cannot be permitted to escape, from the obligations thus imposed upon it, by transferring its chartered rights and privileges either to an individual or to another corporation. A corporation must of necessity always act through individuals; and whether such individuals are called its officers or agents, or its lessees, cannot affect the question of its liability to perform the obligations which it has incurred in consideration of the grant of its chartered rights and privileges. It cannot be permitted to enjoy the benefits conferred by its charter without incurring the responsibilities incident thereto. As was said in one of the cases, if it were otherwise, a railroad company, by leasing its road to irresponsible persons, might enjoy all the benefits conferred by its charter, and practically leave the public generally, as well as individuals, without any

of the protection which the obligations imposed upon the company by its charter, as well as the general law of the state, were designed to afford. Accordingly, we find it laid down by Mr. Justice Davis, in the case of Railroad Co. v. Brown, 17 Wall. 450, as 'the accepted doctrine in this country, that a railroad corporation cannot escape the performance of any duty or obligation, imposed by its charter or the general laws of the state, by a voluntary surrender of its road into the hands of lessees.' This doctrine was recognized and affirmed by this court, in *Bank v. Railway Co.*, 25 S. C. 222, although the court, in that case, not because any doubt was entertained as to the soundness of the doctrine just laid down, did state, merely as an additional reason for the conclusion there reached, that the contract there was made with the lessor and not with the lessee."

The supreme court of Texas held, in the case of *Gulf, C. & S. F. R. Co. v. Morris*, 67 Tex. 692; s. c., 35 Am. & Eng. R. R. Cas. 94, that corporations organized for public purposes cannot, by a contract of sale, lease, or otherwise, absolve themselves from the obligations which form the main consideration for giving them a corporate existence, except it be taken by the consent of the state, given through the charter or in some other manner.

It is well settled that a railroad company cannot escape the performance of any duty or obligation, imposed by its charter or by the general law of the state, by a transfer or lease of its road, or a voluntary surrender thereof, into the hands of the trustee of its own selection; nor can it in this manner relieve itself from liability of wrongs or injuries subsequently done to persons or property in the negligent operation of its road. See *Mason & A. R. Co. v. Maves*, 49 Ga. 355; *Chicago & R. I. R. Co. v. Whipple*, 22 Ill. 105; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 623; *Thompson v. New Orleans & C. R. Co.*, 10 La. An. 403; *Braslin v. Somerville H. R. Co.*, 145 Mass. 64; *Langley v. Boston & M. R. Co.*, 76 Mass. (10 Gray) 103; *Freeman v. Minneapolis & St. L. R. Co.*, 28 Minn. 443; *Abbot v. Johnston, G. & K. H. R. Co.*, 80 N. Y. 29; s. c., 36 Am. Rep. 572; *Lakin v. Willimette Val. & C. R. Co.*, 13 Ore. 436; s. c., 26 Am. & Eng. R. R. Cas. 611; *Nelson v. Vermont & C. R. Co.*, 26 Vt. 717; *Nagle v. Alexander & F. R. Co.*, 83 Va. 707; s. c., 32 Am. & Eng. R. R. Cas. 401; *Washington & A. & G. R. Co. v. Brown*, 84 U. S. (17 Wall.) 445; bk. 21, L. ed. 675; *York & M. L. R. Co. v. Winans*, 58 U. S. (17 How.) 30; bk. 15, L. ed. 27; *Graham v. Northeastern R. Co.*, 18 C. B. N. S. 229; *Abbot v. Gloversville & K. H. R. Co.*, 21 Alb. L. J. 193; and see, *ante*, *Backus v. Detroit, etc., R. Co.*, 436, and note, 442.

It is said, by the supreme court of Illinois, in *Balsley v. St. Louis, A. & T. H. R. Co.*, 119 Ill. 68; s. c., 25 Am. & Eng. R. R. Cas. 497, that the ground of the liability of a railway company, which has leased its land to another company, for the acts of the lessee, is not merely that the lessee is the agent of the lessor, but that the lessor, in consideration of the grant by its charter, undertook the performance of duties and obligations toward the public, and that public policy requires that it should not be relieved therefrom without the consent of the legislature. See *Singleton v. Southwestern R. Co.*, 70 Ga. 464; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 624; *Thomas v. West Jersey R. Co.*, 101 U. S. (11 Otto) 83; bk. 25, L. ed. 950; *Washington, A. & G. R. Co. v. Brown*, 84 U. S. (17 Wall.) 450, 451; bk. 21, L. ed. 675; *York & M. L. R. Co. v. Winans*, 58 U. S. (17 How.) 39; bk. 15, L. ed. 27.

Same—Authority to Lease.—It is said, in the case of *Larkin v. Willimette Val. & C. R. Co.*, 13 Ore. 436, that it is regarded as settled that, where one railroad company is authorized by law to contract or lease its road to another company, it is not responsible for the torts committed by the other company in the running of its trains or the management of the road. See *Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 68; *Ditchett v. Spuyten Duyval R. Co.*, 67 N. Y. 425.

NORWICH AND WORCESTER R. CO.

v.

CITY OF WORCESTER.

(Massachusetts Supreme Judicial Court, October 19, 1888.)

Railroad Company—Lease of Road—Injury to Property—Rights of Lessor.—Under lease of a railroad company including all lands on which the depot grounds, etc., were and might thereafter be located, and including such new ground as might thereafter be acquired,—lands afterwards acquired for depot grounds do not pass to the lessee immediately; and the lessor is entitled to recover damages for any injuries thereto while they are in his possession, being graded and prepared.

Same—Action by Lessor—Evidence.—In an action by the lessor to recover for such damage, the admission of evidence, that the lessee requested the lessor to construct a retaining wall, is harmless error, the evidence being immaterial, and could not in any way have injured the defendant.

EXCEPTIONS from Superior Court, Worcester County.

Petition by the Norwich & Worcester R. Co. against the city of Worcester, for damages sustained by lowering the grade of Southbridge street.

Verdict for plaintiff, and defendant excepted.

T. G. Kent and *G. T. Dewey* for plaintiff.

F. P. Goulding for defendant.

W. ALLEN, J.—The petitioners in 1885 took certain land under St. 1884, c. 157, for a new Station and yard in the city of Worcester; and before the land was fitted or used for railroad purposes it was injured by reason of the lowering of the grade of an adjoining street. To this petition for damages, it is objected that the petitioner had no greater interest in the land than that of lessor. In 1869, the plaintiff made a lease for 100 years of its railroad, including the old station and yard at Worcester, to the Boston, Hartford & Erie Co., whose successor is the New York & New England R. Co. After the new station buildings, tracks, and yard were completed, they were taken possession of by the New York & New England R. Co., and the old location discontinued. The question is whether the land came under the operation of the lease when it was taken by the petitioner, or when it was fitted for use and taken possession of by the lessee as part of the railroad. The lease was of the railroad of the lessor, extending from Worcester to Allyn's Point, in Connecticut, "together with all the lands on which said railway is or shall be located within said terminal

Facts.

points, and which are connected with the uses of said railway," and all rights and privileges connected, and all tracks, depot grounds, buildings, etc., "now used and belonging and to be used or belonging or in any wise appertaining to said road," etc. Another provision of the lease relates to a change of the road and station grounds in Worcester or any other place, and provides for the purchase of land for that purpose, and for the cost of the new line, grounds, and buildings, and that "the new track, grounds, and buildings shall be included under this indenture of lease, for the same time and upon the same terms and conditions that the railway is herein leased." It

Land purchased for new station and yard.

seems clear that it was not the intention of the parties that land purchased for the construction of a new station and yard should come under the lease as soon as purchased. The lease was of a completed road ready to be used by the lessee. The road-bed, buildings, and all the leased property was to be maintained and kept in repair, and replaced when destroyed, by the lessee. The lessee had authority to improve the road, and the lessor was bound, at the request of the lessee, to do all lawful corporate acts to enable the lessee at its expense to improve the railroad, or make addition to lands. In everything except in the change of station grounds and buildings, the lessee was to be the actor, and to furnish the funds. In regard to that, the lessor was to be the actor; was to sell, with the consent of the lessee, the old, and to procure the new, and to furnish the means from the proceeds of sales or from its own bonds (the interest on which the lessee was to pay). It was to purchase and grade the land, erect the buildings, and lay the tracks; and not the land when purchased, but "the new track, grounds, and buildings," were to come under the lease. Land purchased by the lessor which was not connected with the roads, but was intended for future use after it should be fitted and prepared, would not be land on which the road was located, and would be no part of the road. It would be land procured for the purpose of changing the road, and until the change should be made, and the new tracks put in connection with the road, it would not become a part of it. In this case the land was not purchased, but was taken, and preparations for a change of location made, by authority and direction of the statute. It does not appear that it was done under the lease, or with the assent of the lessee. The land, having been taken under the statute, was being graded and prepared, for the new location and station required by the statute, when the damage was done. It was in possession of the lessor. There were no tracks or buildings upon it, and it was not connected or used with the railroad. It remained in the possession of the lessor until the tracks, grounds, and buildings were completed

ready for use, and then "the premises were turned over to the lessee." We are of opinion that they did not come under the operation of the lease until the possession was thus taken by the lessee, and that the rulings asked for by the respondent were properly refused.

The only other exception is to the admission of evidence that a demand to build the retaining wall was made by the lessee upon the lessor. The exceptions state that this evidence was admitted *de bene*, and was not afterwards referred to by court or counsel. The amount of damage claimed by the petitioner was the expense of building the wall. We do not see how the evidence was material. If it had been contended for the respondent that, after the lessee had accepted the premises without the wall, the lessor had no interest in it, or that for any reason it was necessary to show a demand for the wall by the lessee, it might have been competent. But it does not appear that any demand was necessary. As it was, it could have had no effect unless, to forestall such an argument. It seems to have been in fact, and to have been regarded by the court, as immaterial when offered, but as something which might in some possible aspect of the case become material, and to have been no further regarded by any one. It was not received as an expression of the opinion, of the officer who made the demand, that a wall was necessary. It was immaterial evidence, by which the respondent was not injured.

Evidence of demand to build retaining wall.

Exceptions overruled.

RUE

v.

MISSOURI PACIFIC R. CO.

(*Texas Supreme Court, May 15, 1888.*)

Regulation of Railroad Companies by Statute—Contract with Employee—Ratification.—Under section 818, Mo. Rev. Stat., providing that no officer or employee of any railroad corporation shall be interested in furnishing supplies to such corporation, nor in the business of transportation, as a common carrier, of freight or passengers over the works owned, leased, or operated by the company of which he is officer or employee; a contract entered into with a railroad company, organized under the Missouri laws and operating a road in another state, by a stock agent of the company leasing for a term of years, certain of the company's stock-yards in such other state, in consideration of his receiving from the company one dollar

36 A. & E. R. R. Cas.—29

per car-load for loading and unloading stock which he is to feed, and charge and collect the expenses against shippers; is void in its inception and cannot be validated by ratification.

COMMISSIONER'S decision.

Appeal from Grayson County District Court.

This was an action by R. H. Rue against the Missouri Pacific R. Co. to recover damages for breach of a contract of lease. The plaintiff appeals from a judgment for defendant.

Hare & Head for appellant.

R. C. Foster and *A. E. Wilkinson* for appellee.

ACKER, J.—In the spring of 1881, appellant entered into a parol contract with Hill, the general freight agent of appellee, to become stock agent for appellee at a salary of \$2,000 a year, and to lease from appellee its stock-yards at Vinita *Facts.* and Muscogee, in the Indian Territory, and at Denison and Gainesville, in Texas, for a term of five years, at the annual rental of \$800 per year, payable quarterly in advance; appellee to pay him one dollar a car for loading and unloading stock, he to furnish forage for stock, to be charged against shippers, collected by appellee, and paid to him. A. A. Talmage, general manager of appellee's road, was in Denison when the contract was entered into between Hill and Rue, and assented to it. Appellant immediately entered upon the performance of his duties under the contract, both as stock agent and lessee of the yards, and soon thereafter made a contract with J. S. Talmage, brother of A. A. Talmage, by which J. S. Talmage became the owner of two-thirds interest in the stock-yards contract. On June 1, 1881, that part of the contract relating to the lease of the stock-yards was reduced to writing, and executed in the city of St. Louis, Mo., by being signed, "THE MISSOURI PACIFIC R. CO., By A. A. TALMAGE, General Manager," and "R. H. RUE;" J. S. Talmage not appearing to be a party to the contract. Appellant continued to operate the stock-yards under his lease, paying rent, and receiving pay for his services from appellee, until in February, 1883, when he received notice from appellee to surrender the yards. Appellant refused to obey this notice, and continued to run all the yards until May 1, 1883, when appellee took forcible possession of the Denison yards, and discontinued all business at the Vinita yards. Appellant continued in possession of all yards named in the contract, except the Denison yards, and continued to operate them down to the time of the trial, and was paid by appellee for his services according to the contract, but appellee refused to receive from appellant the rents due on the contract after it took possession of the Denison yards. This suit was brought by appellant to recover damages for breach of the contract of lease by

depriving him of the division yards, and discontinuing the business at the Vinita yards. The stock-yards were the property of the Missouri, Kansas & Texas R. Co.; appellee being lessee of the railroad, property, and franchises of that company. A. A. Talmage was appointed manager of the Missouri, Kansas & Texas R. Co. on December 1, 1880, and continued in the same position for appellee, when the road came into its hands. Appellant ceased to be stock agent in October, 1882. The written contract of lease executed on June 1, 1881, was offered in evidence by appellant and was objected to by appellee on the following grounds: "Because said instrument is not shown to have been executed by defendant, or by any one by it thereunto lawfully authorized, and because it is not shown to have been executed by any one authorized thereunto by writing; because it does not appear to have been executed by an officer authorized by law, and is not under the corporate seal, and no authority from defendant for its execution is shown; and because the acts shown and relied on as acts of ratification thereof were not done by any person shown to have authority to ratify said instrument; and because said acts were not shown to have been done by any person authorized by writing to ratify the same, nor by any person having authority to ratify the same, given by said corporation or its stockholders, or by its board of directors, nor with any knowledge on the part of said stockholders, nor of said directors, or any one representing said corporation, of the existence or terms of said lease; and because such acts were not in themselves sufficient to constitute a ratification under the circumstances under which they were done; and because said lease is unlawful, beyond the power of the corporation to make, contrary to public policy, and void." The objection was sustained, the lease excluded, and judgment rendered for appellee.

It does appear from the findings of the court whether the objection was sustained upon a part only or all of the grounds stated. If any one of these grounds was sufficient to support the objection, then the ruling of the court must be sustained. Under the view we entertain of the law of the case, it is not necessary to consider all of them. It is contended by appellant that the appointment of A. A. Talmage to the position of general manager, together with the control exercised by him over the stock-yards by virtue of his office, conferred upon him authority to make the lease. Article 548 of our statutes provides that no state of inheritance or freehold, or for a term of more than one year, in lands and tenements, shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or

Authority to
make lease.

by his agent thereunto authorized by writing. The lease being for a term of more than one year, to be valid, must have been executed by appellee, or by its agent thereunto authorized by writing. There is no pretense that Talmage ever had any express authority, by resolution of the board of directors or otherwise, to make the lease. We understand the word "thereunto," used in the statute quoted, to mean, unto this or that : that is, the particular thing done. We do not think the power to control and manage the yards, which were necessary appurtenances to carrying on the business of common carrier of stock, carried with it the power to dispose of the yards by leasing them, and throwing over their management and control to another. Appellee owes its existence to the constitution and laws of the state of Missouri, under and by virtue of which it obtained its being, and from which it derived all its powers. Nat-

Contract with
stock agent
void.

ural persons may make any contract or perform any act not prohibited by law, while artificial persons (corporations) can do only those things which, by express grant or necessary implication, they are authorized or empowered to do by the laws of the state under which their charters were obtained. The laws of Missouri (section 818 of the Revised Statutes) provides that no president, director, officer, employee of any railroad corporation operating a railroad shall hereafter be interested in any manner, directly or indirectly, in furnishing materials or supplies to such company; nor shall any such officer, agent or employee of any railroad company, or any other corporation, owning or controlling or managing a railroad, be interested directly or indirectly, in the business of transportation, as a common carrier of freight or passengers, over the works owned, leased, controlled or operated by the corporation of which he is an officer, agent or employee. That appellant was the stock agent and employee of appellee at the time the contract of lease was executed, there is no controversy. It is equally clear to us that, by the term of the contract, he became interested in furnishing supplies [forage for live-stock] to appellee, and that he became also interested in the business of transportation as common carrier over the roads operated by appellee. Under the law, appellee, as common carrier, was bound to transport live-stock, and to furnish forage for their sustenance. The forage, so furnished by appellant, was furnished to the company, and the supplying of forage was an indispensable part of the business of common carrier of that kind of freight. Had the contract been entered into by the president and secretary of the company, after resolution adopted by the board of directors authorizing them to make it, and had it been executed with strict observance of all formalities, it would have been void, because it was prohibited by the laws of

the state from which appellee derived its existence and its powers. Story, Conf. Law, 174, 175, and note *a*; Matthews *v.* Skinker, 62 Mo., 331; Black *v.* Canal Co., 22 N. J. Eq. 422. We think this statute of Missouri a wise and beneficent law, and that it applies to all corporations chartered under the laws of that state, without regard to whether the prohibited contract is to be performed within or without that state. We think it wholly immaterial whether the instrument be called a lease or a contract; it was prohibited by the laws of Missouri, to which those dealing with appellee must look to see what contracts it could make. No acts of ratification can validate or make effective that which is void.

We deem it unnecessary to consider other questions presented. We are of opinion that the court did not err in excluding the contract of lease, and that the judgment of the court below should be affirmed.

STAYTON, J. C. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

PITTSBURGH AND CONNELLSVILLE R. CO.

v.

SHAW.

(*Pennsylvania Supreme Court, May 21, 1888.*)

Contract for Construction of Telegraph Line—Breach—Damages.—Where a railroad company made an agreement with a telegraph company to extend its line from Connellsville to Uniontown, Pennsylvania, on condition that defendant should have the collections for messages taken at Uniontown to go to points on the company's line to which arrangement the plaintiff, in whose name the action is prosecuted, became a party, agreeing with the railroad company to erect and complete said extension in consideration of one half of the receipts thereof, no charge to be made for the railroad business; on the lease of said line to another telegraph company provision was made by agreement, between defendant and said new company, whereby defendant was to have the gross receipts of the Connellsville & Uniontown line, *held*, that the plaintiff having built the line as he agreed, was entitled, in pursuance of the aforesaid stipulations, to one half of all the earnings of the telegraph line from Connellsville to Uniontown, including intermediate stations.

Same—Action for Breach—Report of Referee.—In an action to recover damages for breach of an agreement to pay over the earnings of a certain line of telegraph during a period of years, the report of a referee giving the sum in gross for each office on the line to which the plaintiff is en-

titled, will not be set aside for failure to give the annual earnings of each office, or the average annual receipts of two or more of them.

Same—Wire to be Used in Business—Breach of Contract—Damages.—Where an agreement of plaintiff to erect a telegraph along the line of defendant's railroad, in consideration of one half the receipts thereof, contains a privilege to the railroad of putting an additional wire upon the poles of plaintiff to be used for the business of the railroad only, and upon the exercise of such privilege the contract for maintenance and working of the line on the part of the railroad company should cease, *held*, that the use of such wire for commercial as well as railroad purposes entitled the plaintiff to damages based on the earnings of the line with the additional wire.

Same—Acts Ultra Vires—Defence of—Estoppel.—The defence that a contract on the part of a railroad company to maintain and operate a telegraph line is *ultra vires* is not available to the defendant in this action.

ERROR to the Common Pleas of Fayette County, to review a judgment in favor of the plaintiff in an action of covenant, affirmed.

The case was referred to A. D. Boyd, Esq., under the provisions of the act of 1874.

On the hearing, the defendant submitted certain points to the referee which, in effect, presented the claim that the contract in suit was *ultra vires* of the defendant railroad company, and that there was no evidence to justify a finding in favor of the plaintiff. These points were refused.

The referee filed his original decision on September 3, 1887, and on the same day judgment was entered thereon in accordance with its findings, by the prothonotary. On September 20, 1887, the defendant filed exceptions to the findings of fact, the answers to points, and conclusions of law of the referee.

September 22, 1887, the referee filed the following decision as modified after exceptions, in which decisions the nature of the exceptions is stated:

The undersigned, to whom was referred the above case, as appears by the certificate hereunto attached, makes report:

That, after acceptance of said appointment and filing in the office of the prothonotary the affidavit required by the act of May 14, 1874, section 2, he met the attorneys of the parties, plaintiff and defendant, at his office in Uniontown, from time to time in accordance with agreement. At these meetings testimony was taken and the argument of counsel thereon was concluded January 15, 1887.

The plaintiff sues to recover damages for breach of covenants contained in an article of agreement entered into between James L. Shaw and the defendant company on the 6th day of March, 1865. The evidence shows that an article of agreement under seal, between the Pittsburgh & Connellsville R. Co. and the United States Telegraph Co., was made and entered into on the first day of March, 1865, by the terms of which the said

railroad company agreed to build a good and substantial line of telegraph, by the route of the Fayette County R., connecting the terminus of the said United States Telegraph Co.'s line at Connellsville, Fayette County, Pennsylvania, with Uniontown in said county, and have opened in Uniontown a telegraph office for commercial and railroad business; and it was further stipulated in said agreement that all money or moneys collected for messages at Uniontown, to pass over any line owned or controlled by the United States Telegraph Co., should be retained by the Uniontown office for the benefit of the railroad company, saving and excepting such portion of said money, or moneys as should be received for other lines than those owned or controlled by said United States Telegraph Co., which were to be paid to said company. There were other stipulations in this agreement but they have no bearing on this case.

The Pittsburgh & Connellsville R. Co., defendant, and James L. Shaw, of plaintiffs, on the 6th day of March, 1865, made and entered into a written contract, under seal, whereby the said James L. Shaw agreed and undertook to build a telegraph line from Connellsville to Uniontown, for and in consideration of the undertakings and agreement by the said railroad company, that upon the erection and completion, by the said James L. Shaw, of the said line of telegraph, that the said railroad company would, at the proper cost and expense of said company, furnish competent and skilful operators for working the said telegraph line, as also offices, batteries, and all other material needed to successfully work said telegraph line, and to keep the same in good order and repair, the natural wear and tear excepted. The said railroad company to have the privilege of transmitting all messages for the working or management of the said railroad free and without cost, and to pay to the said Shaw, the one half of all its earnings subject to the aforesaid contract between the said railroad company and the United States Telegraph Co.

The defendant company, in its agreement with James L. Shaw aforesaid, further agreed to account for and pay over to the said James L. Shaw, the one half of the whole amount of the earnings of the said line of telegraph which said railroad company was entitled to have and retain under its contract with the United States Telegraph Co. as aforesaid.

In pursuance of the said contract between the defendant company and James L. Shaw, the said James L. Shaw did extend, make, erect, and put in complete order for use a line of telegraph from Uniontown to Connellsville; and said defendant company did, on the first day of April, 1865, take possession of and begin using the same, according to the provisions of the said contract and agreement between the said company and James L. Shaw; and the said company has been in possession

of said line of telegraph ever since, and has been using the same continuously since taking possession thereof.

On the 8th day of February, 1865, an article of agreement was made and entered into by and between the said James L. Shaw and the parties who, by themselves and their legal representatives, have become the plaintiffs in this action, whereby the rights of the said James L. Shaw, under and by force and virtue of the said contract of the defendant company with said Shaw, became, for a valuable consideration, legally vested in plaintiffs in as full and complete a manner as the said James L. Shaw held the same.

From the first day of April, 1865, to the first day of January, 1874, a period of nearly nine years, the defendant company did, in pursuance of its agreement entered into with Shaw, account for and pay over to the assignees of Shaw, the plaintiff in this suit, at stated times during the said period of nine years, the just and full sum of one half of said railroad company's share of the net profits of the Uniontown office of said line of telegraph from Connellsville to Uniontown, which amounted to the sum of \$2912.

The defendant company has accounted for and paid over to the plaintiffs in this suit nothing whatever of the earnings or net profits of said line of telegraph, since the first of January, 1874, and from that time on has appropriated, controlled, and managed the said line to the exclusive use, business, and purposes of the defendant company. It was claimed on the part of the defendant company that the Western Union Telegraph Co., having on the 31st day of December, 1873, established a telegraph office for general and commercial business at a point in Uniontown which, from its central location and facilities for transacting the telegraph business, deprived the Uniontown office of the defendant company of almost its entire general and commercial business. I find that, notwithstanding the establishment of the Western Union office in a more advantageous location in Uniontown than that of the defendant company's office, and the consequent decreased receipts at the defendant company's office, yet if defendant company's office had been kept open for commercial business, as it was its duty to do, it would still have received a share of the rapidly increasing telegraph business of the place. And while the receipts for a while after that date might not have amounted to as much as they did prior to the establishment of the Western Union Telegraph office, I am of the opinion, and so find, that the average annual receipts of the defendant company's office at Uniontown from that date to the present time should have amounted to at least as much as they did prior to that time, when the telegraph business was in its infancy in the Uniontown locality. The one half of the

average annual receipts of the Uniontown office prior to that time was \$323.55. [The defendant company claimed that the plaintiffs, if entitled to recover, were only "entitled to recover a share of the receipts of the Uniontown office, and were not entitled to receive any portion of the receipts of either the Dunbar or Lemont offices. We are of opinion that the plaintiffs are entitled to recover for Dunbar and Lemont offices the same share of the receipts as for the Uniontown office.] The defendant company caused to be placed upon the poles of the Shaw line an extra wire on or about the first day of May, 1883, which has been in constant use by the defendant ever since for railroad and commercial business. [Under these facts I am of the opinion that the plaintiffs are entitled to recover damages, the measure of which is the one half of what should have been the earnings of the line of telegraph built by James L. Shaw, as aforesaid, from the first day of January, 1874, to the 15th day of January, 1887, together with interest on the same from the several times when the same should have been paid, beginning the first day of April, 1874, to the first day of September, 1887.] These several sums, together with the interest computed as aforesaid, amount to \$11,766.17, which sum is made up of receipts and interest on the same as follows, viz :

Uniontown office.....	\$ 5,821.87
Dunbar office.....	5,390.78
Lemont office.....	553.52
	<hr/>
	\$11,766.17

And for this sum of \$11,766.17, I do find in favor of the plaintiffs, and against the defendant, as of September 1, 1887. The sixth proposition of law submitted by defendant's counsel, as set forth in defendant's points is affirmed; the others are refused.

After the referee had made the foregoing finding, the plaintiffs presented the following request :

The plaintiffs request the referee to find the following facts, omitted in the report but appearing in the evidence :

First. The agreement between the Pittsburgh & Connellsville R. Co. and the Western Union Telegraph Co., dated May 24, 1867, and its effect upon the agreement with the plaintiff Shaw.

In pursuance of this request the referee re-examined his report and finds as follows, viz.:

The lines, property and rights of the United States Telegraph Co. having been leased and assigned to the Western Union Telegraph Co. about the first of March, 1866, on the 24th day of May, 1867, the before-mentioned article of agreement between the defendant and the United States Telegraph Co. of March 1, 1865, was "modified" and explained in respect of the Shaw line,

as follows, viz.: "Except and provided that nothing herein stated shall affect the agreement existing as to the line between Connellsville and Uniontown, the railroad company being entitled to the gross receipts of said offices on business to points on the telegraph company's lines and not to points beyond."

The defendant has filed twenty-eight exceptions to the referee's finding. The first, second and third of the said exceptions allege that the referee has not separately and distinctly found the facts shown by the testimony, but specify no facts shown by the testimony and omitted by the referee. The referee considers that his finding specifically shows all facts sustained by the testimony which are material to the issue. As to the fourth, fifth and sixth exceptions, the referee declines to modify his finding, because, according to his best judgment, he has applied the law correctly to the case before him.

In the seventh exception the defendant alleges that the referee erred in allowing damages to September 1, 1887. The referee did not award damages to September 1, 1887, but only to January 15, 1887, when the testimony finally closed, although interest is calculated to September 1, 1887, three days before the filing of the finding. One or two clerical errors as to dates, and this one among them, and also a few minor verbal matters, occurred in the original draft of the finding, but they have now been corrected.

The eighth exception, alleging error in finding damages upon a basis running back further than six years before September 1, 1887, or the time of trial, is overruled, the covenants upon which the action is founded being under seal.

The ninth exception is overruled, because the referee regards the articles of agreement of March 1, 1865, between the United States Telegraph Co. and the Pittsburgh & Connellsville R. Co., and the agreement of March 6, 1865, between James L. Shaw and the Pittsburgh & Connellsville R. Co., as modified by the article of agreement of May 24, 1867, all together, and considers the right of the plaintiffs, to one half of all the earnings of the Shaw line, under these articles to be clear. Dunbar and Lemont offices being on this line between Uniontown and Connellsville the receipts at those offices are part of the earnings of the Shaw line; the defendant is bound to account for the plaintiffs' share of them, and not having done so is liable in damages, to be measured by the amount of the said earnings so received and retained.

The tenth, eleventh and twelfth exceptions allege error because the referee did not find the annual receipts of the Uniontown, Dunbar and Lemont telegraph offices, the average annual receipts of the Dunbar and Lemont offices and because interest is allowed to September 1, 1887. The referee considers that

he has found these items as specifically as the law requires him to do so, and calls attention to the fact that he has returned the evidence of the earnings of the said offices upon which his finding is founded.

The referee also considers that, in analogy to the finding of a verdict by a jury, the law requires him to calculate interest upon the earnings of the said offices to the date of the filing of his finding; in addition to which reason the plaintiffs in this case gave notice, in writing (on the 6th day of October, 1875, which is returned with the finding) to the defendant (under the act of assembly of May 2, 1876, *Purd. 502 pl. 6*) that damages would be claimed to the time of trial.

The thirteenth and fifteenth exceptions allege error in the referee's construction of the before mentioned articles of agreement between James L. Shaw and the defendant, and the agreement of February 8, 1865, whereby the plaintiffs claim to derive title from Shaw. The referee cannot see that he is wrong in this.

The fourteenth exception alleges that the referee erred in awarding damages against the defendant, based upon earnings of the Shaw line after May 1, 1883, when the defendant, or some lessee or successor of the defendant, either the Baltimore & Ohio R. Co. or the Baltimore & Ohio Telegraph Co., put the additional wire on the Shaw poles, as provided in the contract of March 6, 1865, between the defendant and Shaw.

The referee does not consider that there is any error in this part of his finding. The clause of the article between Shaw and the defendant, to which the exception refers, is as follows, viz.:

"The railroad company shall have the privilege at any time of putting a wire upon the poles of the party of the first part on their line to be used by them for their own proper business, but not for commercial or pay messages; upon the exercise of this privilege the contract for maintenance and working of the line on part of the railroad company to cease and be void."

W. C. Griswold, assistant superintendent of the Baltimore & Ohio Telegraph Co., a witness called by the defendant, testified that this additional wire was put upon the Shaw poles about the first of May, 1883, and that from the time it was put up it has been used for railroad and commercial purposes. The referee, therefore, does not consider the Shaw contract as avoided by this additional wire, the fact of the use of that wire for commercial purposes putting it outside of the provisions of the clause of the agreement invoked as a defence by the defendant. The referee also considers it immaterial whether the additional wire was put up by the defendant or by the Baltimore & Ohio R., or Telegraph Co.; the defendant is responsible for the care and

maintenance of the Shaw line and for the use of it, either by the defendant or others.

The referee has modified his original finding in accordance with the sixteenth exception, so far as he considers to be right; in all other respects it is overruled. [This exception referred to the finding in relation to the exclusion of commercial business from defendant's office.]

In so far as the seventeenth and eighteenth exceptions refer to the findings of the referee as to dates, the original finding has been modified; in all other respects those exceptions are overruled. [The exceptions referred to the measure of damages.]

The nineteenth and twentieth exceptions are overruled. [These exceptions referred to calculation of interest; and amount found in favor of plaintiff.]

The twenty-first and twenty-second exceptions allege error on the part of the referee in not finding the fact of the incorporation of the defendant, the Pittsburgh & Connellsville R. Co., by act of assembly and its powers and rights under the act incorporating it. The act of assembly incorporating the defendant was offered in evidence. The referee noticed it and considered it as he would have thought himself bound to do, even if it had not been specifically offered in evidence; but the referee does not consider himself bound to make a more specific finding concerning it, and concerning the powers, duties and obligations of the defendant under it, than he has done in finding damages against the defendant, notwithstanding the defendant's pleas, which specifically set up the said act of incorporation, and the other written and unwritten laws of this commonwealth, as a defence to this action. These exceptions raise the defence of *ultra vires*, which the referee does not consider available to the defendant in this action, as he understands the law to be set forth in the following, among other, decided cases and authorities: Green's Brice, *Ultra Vires*, 608 and note; *Oil Creek & A. R. Co. v. Pa. Transp. Co.*, 83 Pa. 160; 1 Wood, *Railway Law*, pp. 502, 553, 558, §§ 172, 192, 193, and p. 560, note 4; *Hitchcock v. Galveston*, 96 U. S. 341 (24 L. ed. 659); *Wright v. Pipe Line Co.*, 101 Pa. 204; *First Nat. Bank v. Graham*, 100 U. S. 699-702 (25 L. ed. 750, 751); *Casey v. Galli*, Am. Law Reg. July, 1877, pp. 444; 25 Fed. Rep. 812; *Kelley v. Newburyport & A. H. R. Co.*, 2 New Eng. Rep. 383; s. c., 23 Cent. L. J. 261; *Thomas v. West Jersey R. Co.*, 101 U. S. 71 (25 L. ed. 950); *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258 (24 L. ed. 693). These exceptions are therefore overruled.

In the twenty-third, twenty-fourth and twenty-fifth exceptions the defendant alleges error on the part of the referee in not specifically finding the fact that the United States Telegraph Co., or its successor, forcibly severed the connection of the Shaw line

at Connellsville, with the network of telegraph wires covering an immense extent of territory, on the first of January, 1874, thus cutting off the profitable portion of the telegraph field, in consequence whereof the earnings of the Shaw line were reduced to a very small sum, or were altogether destroyed, and that such severance of the telegraph connection, and consequent diminution of earnings, formed a complete defence to the plaintiff's action.

The referee does find that on or about the first day of March, 1866, the lines, property and rights of the United States Telegraph Co. were leased and assigned to the Western Union Telegraph Co., and that the Western Union Telegraph assumed possession and control of the said United States Telegraph Co.'s property. Further than this the referee does not consider it his duty to go, although he deems it proper to adhere to his finding, in response to the said last mentioned exceptions, that by thus coming into the room and stead of the United States Telegraph Co., the Western Union Telegraph Co. became liable to perform all contract duties and obligations incumbent upon the United States Telegraph Co., and among these duties and obligations the Western Union became liable and bound to afford to the defendant the same telegraphic facilities at Connellsville which the United States Telegraph Co. were bound to furnish, and that in point of fact the Western Union always held itself ready to do so. The referee further finds that no effort to secure such communications after January 1, 1874, appears, by the evidence, ever to have been made by the defendant, although it seems that a simple request would have accomplished it.

The principal ground, however, upon which the referee omitted to make the specific finding, indicated in the said exceptions, and upon which he now declines to include them in his finding, is, that the defendant was bound by the article of agreement with Shaw, of March 6, 1865, for all that appears in the evidence, to keep and maintain Shaw and his assigns in the use, enjoyment and possession of the same telegraphic facilities which existed when that contract was made, and that the action of the Western Union Telegraph Co. in severing the connection at Connellsville is no defence to the Pittsburgh & Connellsville R. Co. in this action, and is not relevant nor material to the issue in this case. The said exceptions, Nos 23, 24, and 25 are, therefore, overruled. *Pollard v. Shaaffer*, 1 U. S. 1 Dall. 210 (1 L. ed. 104); *Atkinson v. Ritchie*, 10 East, 533; *Beale v. Thompson*, 3 Bos. & P. 420; *Brecknock & A. Canal Nav. v. Pritchard*, 6 Term Rep. 750-752; *Bullock v. Dommitt*, 6 Term Rep. 650; *Belfour v. Weston*, 1 Term Rep. 310; 1 Selw. N. P. 382; *Shubrick v. Salmond*, 3 Burr. 1637-1640.

The twenty-sixth exception, alleging error in not finding separately the receipts which should have been found at the Union-town office for messages to certain points, is overruled, because the referee cannot see that he is bound to find the said fact, nor the materiality of such a specific finding.

The twenty-seventh exception, alleging that the referee should have found that the defendant has not been under any obligation to the plaintiffs since May 1, 1883, when the additional wire was put upon the Shaw poles, under the clause in the contract of March 6, 1865, is overruled, because the said additional wire has been used for commercial messages.

The twenty-eighth exception alleges that the referee erred in not finding, as a conclusion of law, that under the contract upon which this action is brought the defendant cannot be compelled to do a general commercial telegraph business, or is liable in damages for refusing to engage in or do such business. This exception is overruled because it presents a point foreign to the issue.

The action on trial is an action for damages for breach of covenants. The making of the covenants, as alleged in the declaration, is not denied, but is admitted by the pleadings, and the referee does not consider the matter set up in avoidance of liability under the said covenants, sufficient according to the referee's judgment; therefore, the defendant is liable, under the said covenants, and the question of carrying on a general commercial telegraph business is not in the case.

Upon the filing of this decision, defendant took this writ, assigning as error: (1-9) the refusal of its points; (10, 11) the portions of the decision inclosed in brackets; (12) that the referee erred in not stating separately and distinctly the facts found, and his conclusions of law thereon; (12½) in not finding the facts put in issue by the pleadings and shown by the testimony in the cause; (13) in finding in favor of the plaintiff in the sum of \$11,766.17, as of September 1, 1887, and ordering judgment to be entered for said sum against the defendant; (14) in entering judgment upon his decision upon September 3, 1887.

John S. McCleave and S. L. Mestresat for plaintiff in error.

Edward Campbell for defendant in error.

PER CURIAM.—An examination of the report of the referee fails to reveal to us any error; on the contrary the controversy seems to have been determined by him in a just and lawful manner.

The mistake made by the prothonotary in entering judgment on the third of September, 1887, affected the rights of neither of the parties, and that mistake seems not to have been regarded in the subsequent proceedings, so that we cannot treat it now as

at all material. If deemed material, the necessary amendment may be made in the court below.

Judgment affirmed.

Contracts of Telegraph Companies with Telegraph Companies.—*Marietta, etc., R. Co. v. West. Un. Tel. Co.*, 10 Am. & Eng. R. R. Cas. 387.

LOUISVILLE CITY R. CO.

v.

CENTRAL PASSENGER R. CO.

(*Kentucky Court of Appeals, May 10, 1888.*)

Horse Railway—Authority to Construct—Right to Use Track of Another Company.—The charter rights of the defendant to construct and operate a double or single track railway along Fourth street between Main and Jefferson streets, in the city of Louisville, does not confer the right to use the tracks of a company already in such street.

Same—Right to Use Track of Another—How Acquired.—The right to use the tracks of the plaintiff on such routes could be derived only by consent of the city council and in pursuance of contract with the plaintiff.

Same—Contract for Use of Track—Compensation.—Where the plaintiff contracted with the defendant for the use of a portion of the plaintiff's tracks in a populous part of a city, in pursuance with consent of the city council, and subject, on notice, to change so as to secure an equitable consideration for the privilege so granted the defendant, the plaintiff though not entitled to the value of the use of the franchise, is still entitled to more than a mere nominal consideration for the use and wear of its tracks.

APPEAL from Louisville Law and Equity Court.

Plaintiff appeals from the determination of the chancellor fixing the amount due it from defendant for the use by defendant of plaintiff's street-railway track.

Alex. P. Humphrey and St. John Boyle for appellant.

Barnett, Noble & Barnett for appellee.

PRYOR, C.J.—This controversy is between the Louisville City R. Co. and the Central Passenger R. Co. as to the value of the use of the railway track and the franchise on Fourth street between Main and Jefferson streets. The power of the city of Louisville to authorize the construction of street railroads is derived from legislative grant that confers on the general council the authority, by contract, to empower any corporation or company, etc., to construct street railroads, "the council reserving all rights to regulate and control the same." The ap-

Facts.

pellant, the Louisville City R. Co., was chartered on the 15th of February, 1864, the second section of its charter providing: "The corporation is hereby authorized and empowered to construct, maintain, and operate a single or double track railway, with all necessary and convenient tracks for turn-outs, side tracks, and appendages, in the city of Louisville, and in, on, over, and along such street or streets, highway or highways, within the present or future limits of the city of Louisville, as the general council of said city shall authorize said corporators so to do, in such manner and upon such terms and conditions, and with such rights and privileges, as the said general council may, by contract or otherwise with said corporation, or any of them, prescribe, as provided in an act entitled 'An act for the benefit of the city of Louisville,' approved March 2, 1863; but said corporation shall not be liable for any baggage carried on said railways, kept in and under the care of its owner, his servant or agent." By virtue of its charter, and the power conferred on the city council, a contract was entered into between the city and this company for the construction of street railroads, the terms and conditions of which, or so much as is deemed material to this controversy, is as follows: "First. The general council of the city of Louisville hereby consent and agree that the Louisville City R. Co. may construct and operate a street railroad or railroads, to be operated alone by animal power, on, over; and along the following streets, and the right and privilege to construct and operate said railroad or railroads is hereby granted to said Louisville City R. Co. by the general council of the city of Louisville, on, over, and along the following designated streets, to wit: Commencing at or near Main and Twelfth streets, running through and along Main street, with double track, to or near Beargrass street, at the eastern end of Main street; also at Twelfth street to Jefferson street, through and along Jefferson to its junction with the Bardstown turnpike; also at Twelfth street and Jefferson street, through and along Twelfth street to Broadway, through and along Broadway to the city limits, in the direction of Cave Hill cemetery; also from Main street, through and along Sixth street, to Broadway, with double track; also commencing on Preston street near the Ohio river, thence over, along, and through Preston street to the city limits, in the direction of Belleview and Spring Gardens; and the said railway company shall have the right to connect any of said railways the one with the other. If the First & Second Street Horse R. Co. shall, within thirty days of the signing of this contract, file in the office of the mayor of the city of Louisville their consent to the rescission of their contract with the city, then, in consideration thereof, it is made a condition of this grant, irrevocable without the consent of said First & Second Street Horse R. Co., that the Louisville City R. Co. shall lay down,

under the provisions of this agreement, a line of road from the corner of Fourth and Main streets, out Fourth to Jefferson, up Jefferson to Second, out Second to Breckinridge, within twelve months from the completion of this contract; said line to be extended p Breckinridge to First street, and out First street to the city limits, whenever the improvements in that part of the city shall render such extension proper, to be determined by the general council. And it shall not be a breach of this contract if this extension from Breckinridge street is not made in three years from the signing of this contract, unless ordered by the general council; but the right hereby vested in the Louisville City R. Co., as expressed in the foregoing clause, shall not confer on said company any right or power before given to the First & Second Street Horse R. Co., unless by the consent of said last-named company, evidenced by writing as aforesaid. Second. The right of the Louisville City R. Co., hereby vested in them, to operate said railways, shall extend to the full term of thirty years from the date of this agreement, that being the term for which said company is vested with corporate privileges by the legislature; and at the expiration of said time the said railway company, operating said railways, shall be entitled to enjoy all of said privileges, on the conditions expressed, until the city of Louisville, by the general council, shall elect, by ordinance or resolution for the purpose, to purchase said tracks or said railways, cars, carriages, station-houses, station grounds, depot grounds, furniture, and implements of every kind and description used in the construction and operation of said railways, and of the appurtenances in and about the same, and pay for the same in the manner hereinafter mentioned. Third. Such ordinance or resolution shall fix the time when the city of Louisville will take said railways and other property before mentioned, which shall be not less than six months after the passage of ordinance or resolution; and at the time of taking said railways and property, if the city shall so elect, before mentioned, the city of Louisville shall pay to the said Louisville City R. Co. a sum of money to be ascertained by three commissioners, to be appointed for the purpose, as follows: One to be chosen by the general council from the disinterested freeholders of Jefferson county, one in like manner to be chosen by the said Louisville City R. Co., and these two persons to choose the third in like manner from said freeholders of Jefferson county; but in making the estimate by the commissioners the city is not to be charged with the right of franchise or right of way over the streets herein granted to said railway company for any value or supposed value growing out of the same. . . . Ninth. The said Louisville City R. Co. shall, for the franchise and privilege herein granted to construct and operate railways over the streets hereinbefore named, pay

into the city treasury of the city of Louisville, each and every year, the sum of twenty-five dollars tax or license for each and every car run upon their said railways, or such other sum as the general council may fix, not less than twenty-five and not to exceed fifty dollars for each car so used by said company, so long as said company shall operate said railways, or so long as the same shall be operated by any other company. . . . Eleventh. The city council shall at any future time have the power, when the public good demands, to grant a second or third company or individual the right to occupy any track already laid down, provided the expense of laying and keeping in repair said track, so far as used by different companies or individuals, shall, be equally borne by all those that use them; but the council shall not have the right to grant a permit to run upon any route already disposed of, for a greater distance than one tenth of the whole route; and provided, that no privilege or right shall be granted to any other company or individual to run to the same terminal point over the track of the Louisville City R. Co., or such terminal point or points over their track, than the one tenth of the whole route, but may run upon another street or line to any other point."

Under this contract the Louisville City R. Co. constructed a line of double-track street railway from Fourth and Main, along Fourth street, to Jefferson, with a stand at Fourth and Main streets. The appellee, the Central Passenger R. Co., was chartered in the year 1865, December 29, and, by the second section of the act, was authorized to construct a street railroad as follows: "This corporation is hereby authorized and empowered to construct, maintain, and operate a single or double track railroad, with all necessary and convenient tracks for turnouts, side tracks, and appendages, in the city of Louisville, commencing at the intersection of Water and Second streets, and running south, over and along Second street, to Main street; thence west on Main to Fourth street; then south, over and along Fourth street, to Oak street; and over and along Seventh street from Main street to the southern limits of the city; also on Walnut street, from eastern to western limits of the city, with such further extension in the same or other streets in the city of Louisville as the general council of said city may authorize said corporation so to do, in such manner and upon such terms and conditions, and with such rights and privileges, as the general council may, by contract or otherwise with said corporation, or any of them, prescribe." Under this charter, and by virtue of the power conferred on the city, the Central Passenger R. Co. contracted with the city, the first section of which is as follows: "First. That, in consideration of the payments herein mentioned to be made, and the acts hereinafter stipulated to be done and performed by said Central

Passenger R. Co., the city of Louisville hereby agrees that said Central Passenger R. Co. may construct and operate street railroads, to be operated alone by animal power, on, over, and along Fourth and Walnut streets, as hereinafter shown; and the right and privilege to construct and operate said street railroads are hereby granted to said Central Passenger R. Co. by the city of Louisville, on, over, and along Fourth and Walnut streets, as follows, viz.: Commencing at or near Fourth and Jefferson streets, running thence through and along Fourth street, with double track, and the necessary turnouts, southwardly to Oak street; also over and along Walnut street from Garden to Eighteenth street with double track,—the track to be laid beyond Kentucky street so soon as the street beyond Kentucky street shall be graded. It is further agreed that the said Central Passenger R. Co. shall have the privilege of running their cars to Main street, on Fourth street, over the track of the Louisville City R. Co., as provided in section eleven of the agreement between said Louisville City R. Co. and the city of Louisville, when the consent of said City R. Co. shall be obtained." On the 28th of June, in the year 1866, these companies, the Louisville City R. Co. (appellant), and the Central Passenger R. Co. (appellee), entered into a contract for the use of appellant's tracks on Fourth between Main and Jefferson streets by the appellee, as follows: "This contract witnesseth, that the Louisville City R. Co., of the first part, and the Central Passenger R. Co., of the second part, have this day entered into the following agreement: The first party is to permit the second party to have the use of their tracks on Fourth street between Jefferson and Main streets, in the city of Louisville, for the purpose of running their cars over and along the same, for one year from the date hereof, on the following terms and conditions, to wit. The second party is to use said road, and run their cars thereon, in strict compliance with the contract of the first party with the city, and are to keep said streets and tracks in good repair, as is required by the contract of the first party with said city, at their own expense, during the continuance of this contract. The second party is to pay the first party, in cash, the sum of \$913.18, which is 15 per cent on the actual cost of the construction of the said tracks, the receipt of which is hereby acknowledged. The second party also covenants and agrees to pay the contractor with the city of Louisville, for bowldering Fourth street from Main to Jefferson, the sum of \$500, being the sum agreed to be paid by the first party to said contractor; and the second party do hereby assume said contract for the first party, and agrees to carry out the same, and hold the first party free and harmless therefrom. The second party is to comply with all the ordinances and laws of the city of Louisville, and the contract of said

party with said city in regard to said road, and the operating the same, and in every respect to hold the first party free from damage or cost resulting from their failure to keep said road in order, or in not complying with said contract of the first party with the city, or the laws and ordinances of said city. The second party is to have the use of the stand at Main street, but is not to use it, or any part of said track, so as in any way to interfere with or interrupt the first party in the free and full use of said road for their own purpose; and, to prevent any interference on the part of the second party with the first party in using and operating said road, the second party is to be governed, in their use of the same, by the time-tables of the first party. Should any change of the tracks or stand be necessary in operating said road, said change is to be made at the expense of the second party, but under the direction and advice and with the consent of the superintendent of the first party. It is also understood and agreed that, in the use of said tracks by the second party, they are not in any way to interfere with the running of the cars of the first party on Jefferson street, and in crossing the Jefferson street tracks the cars of the first party are to have the preference; and the second party are to pay all damage to the first party, or to any one else, that may at any time occur by reason of the privilege hereby granted to the second party to cross Jefferson street with their cars. It is also hereby distinctly agreed that Main and Fourth streets is a terminal point of the road of the first party; and by this contract the second party claims no right to run over any other road, or part of road, belonging to the first party than they otherwise would have had, had this agreement not been made; and by this agreement it is understood that the first party guarantees to the second party that they shall at all times have the uninterrupted use of said road, but to the extent only that they have the power to grant or control the same as above set forth. The terms of this contract may be altered from year to year, or at any time after the expiration agreed on, upon notice of thirty days by either party. In the event of such notice, then new terms are to be agreed upon. Should the parties hereto be unable to agree, then each party is to select one person, and these persons, disagreeing, are to select an umpire, to determine upon an equitable consideration for the privileges herein granted to the second party. Their decision, then made, shall be binding on both parties. Should the second party, at any time within — days after notified so to do, fail to fully comply with the terms of this contract, or any that may hereafter be made by the parties hereto, touching the privileges herein granted them, then the first party shall have the right to stop the second party from using said track, and the other privilege herein granted. It is understood

that the use of the tracks, as hereinbefore granted, is to be continued to the second party during the charter of the first party, but the terms therefor may be altered as hereinbefore provided for."

Under the terms of this contract it could be altered from year to year upon notice as provided, and new terms agreed on; and, in the event of disagreement as to the terms, resort was to be had to arbitration, the decision of the arbitrators to determine their respective rights. The appellant, the City R. Co., becoming dissatisfied with the terms of the contract, or the rental value agreed on, gave the proper notice that a change of terms was desirable; and the parties, failing to agree, and making ineffectual efforts to obtain arbitrators, applied to the chancellor to fix the compensation the appellant was entitled to for the use of its tracks by the appellee. The chancellor, on the hearing, gave as compensation, annually, the sum of \$172.08 as rental, and required the appellee, the Passenger R. Co., in addition, to pay three fourths of the taxes, and the annual cost of maintaining the track, which would amount in all to not exceeding \$300. Of this judgment the City R. Co. complains.

It is conceded by counsel for the appellant—or, if not, the authorities settle the question—that the grant of the franchise in the first instance to the appellant did not take from the legislature the right to permit other companies to go upon the same streets of the city, or upon the track of appellant's railway, and compete with the latter in the business of carrying passengers from one part of the city to the other. This may be done upon making compensation to the company whose railway track is used; and, when not used, such grants not being exclusive, the right to construct other and competing tracks in the same street may be allowed without compensation. If the franchise is exclusive, it only applies to the use of the track by the company owning it; and for this use, and not the value of the franchise, the company owning it is entitled to compensation as against a company deriving a like franchise, although of a later date, from the sovereign power. This seems to be the doctrine recognized by Mr. Redfield in his work on Railways, and in the cases of *Railroad Co. v. Railroad Co.*, 12 Allen, 262, and *Railroad Co. v. Railway Co.*, 118 Mass. 290. The grant in this case to the appellee includes in its route Fourth street between Main and Jefferson; and having a like franchise, if unrestricted, would entitle it to use the track of the appellant on Fourth between Main and Jefferson, by compensating the latter for the use and wear of its tracks only, and no compensation should be allowed for the injury to the franchise, or the profits resulting from it. It is urged by counsel for the appellee that such is the nature of its

Grant does not include right to use other company's track—Contract for construction of road.

grant; and that under its charter the right was given, not only to run on the street at the point in controversy, but to use the track of the appellant; and the chancellor below, taking this view of appellee's charter, rendered the judgment complained of. By the act of March, 1863, the general council of the city of Louisville was authorized to have constructed a railroad or railroads, with single or double tracks, on such streets as it might by resolution designate, etc.; and, further, that "the general council might, by contract, sale, or bargain, empower any corporation or corporations, parties or company, to construct said street railroads,—the general council reserving all rights to regulate and control the same." Under this power vested in the city council, the appellant entered into the contract for the construction of its railway, and obtained from the council a stipulation that no privilege or right shall be granted to any other company or individual to run to the same terminal point over the track of its railway. The council, however, reserved the right to permit other companies to occupy the track of the appellant, already laid down, upon the conditions prescribed. This contract has never been modified, either by the council or by amendment to appellant's charter; and whether the exclusive privilege conferred on appellant in denying any other company the right to run to the same terminal point over appellant's track can be enforced, as between the appellant and the city, is not a question before us. That provision of the contract has not been violated so far as this record shows, but has been complied with. When the appellee entered into its contract with the city, it knew the terms of the legislative grant to the appellant, and the nature of the rights and privileges given it by the contract with the general council, and therefore it was provided in the contract with the appellee as follows: "It is further agreed that the said Central Passenger R. Co. shall have the privilege of running their cars to Main street on Fourth street, over the track of the Louisville City R. Co., as provided in section 11 of the agreement between said Louisville City R. Co. and the city of Louisville, when the consent of said City R. Co. shall be obtained." After this, the contract between the two companies was entered into, and the

Contract between two companies.

consent of the appellant obtained upon the terms therein expressed. The contract is to continue until appellant's charter expires; and by its terms the appellee is to pay the appellant \$913.18 per annum, and keep the streets and track in good repair at its own expense, with the proviso that, when either party became dissatisfied as to the terms, the matter was to be referred to arbitrators for an adjustment on equitable terms. The contract was not to be cancelled as to the right of the appellee to the use of appellant's

track, but the terms of the occupancy might be changed by arbitration in the event the two companies failed to agree.

The contention by the appellee that it derived its right to the use of the appellant's track from the legislature, and not by contract with the city or with the appellant, and therefore is only liable for the use of the rails and ties, cannot be sustained. In the first place, the charter of the appellee gives it no right, unless by implication, to use the rails and ties of the appellant. The right to the appellee to construct and operate a single or double track railway along this route did not confer the right to use the appellant's tracks. The right to use the property of another, without his consent and without any provision made for compensation, although for the public use, cannot well arise from mere implication. It is argued that as the appellant already had double tracks on Fourth street, that it is unreasonable to suppose the legislature intended to authorize the laying of two additional tracks on the same street by the appellee, and therefore the right to the use of the tracks already down must have been the legislative will. This view seems not only reasonable, but clear, when taken in connection with the power previously conferred by the legislature on the city council with reference to street railways. A general power to contract with companies for the construction of such railways had been previously given the city, with the right to regulate and control the same. Under this power, the appellant had executed its contract; and when the legislature made the grant to the appellee defining its line of railway, with the right to extend its line to other streets, the power was reserved to the city and the appellee to contract "in such manner, and on such terms and conditions, and with such rights and privileges, as the general council may, by contract or otherwise with said corporation, or any of them, prescribe." They did contract; and it is evident that the city, in prescribing the terms, recognized its obligation to the appellant, and required the appellee to obtain appellant's consent to the use of its tracks on Fourth between Main and Jefferson. This view is in harmony with the legislation under which the appellee obtained its charter, and the previous legislation conferring on the general council the power to contract for the construction of street railways. Both the legislature and the appellee looked to this power given the city; and from that source, and that only, under such a charter, could the appellee have obtained the right to the use of appellant's tracks. Neither the law-makers nor the appellee could have understood that appellee's charter gave it the right to use appellant's property, where there was no express authority given, in the grant, to that effect, without appellant's consent or that of the city council; but,

Compensation
for use of
track.

when considering the legislation already in existence with reference to the city on the same subject-matter, the mode of obtaining the use was well understood. The consent of the city having been given that this use might be obtained by the appellee from the appellant, the contract between the two was entered into. The rights or equities of the parties must, to a great extent, be determined by its terms.

This is not a case where the one company has the legal right to enter upon and use the tracks of another company by reason of legislative authority. It is true that the charter confers upon the appellee the right to lay down tracks on Fourth street; but the city, having a voice in the legislation of street railways, so essential to its interests, and having contracted with the appellant, required that an arrangement should be made between the two companies before the one should use the track of the other; and, to accomplish this, the contract regulating the compensation to be paid the appellant was entered into. The one was contracting for the use of so much of the other's tracks as lay in the most populous part of the city, and at a location where, as the proof shows, is the most desirable terminus. At no point can so many passengers be obtained. It is in the business part of the city; the lines of travel going in all directions from that point, and, as the proof shows, the appellee running four times as many cars as the appellant. These valuable contract rights that were granted to the appellee by the appellant during the existence of its charter were estimated by the two companies, in June, 1866, the sum of \$913 per annum, with the obligation on the part of the appellee to keep the streets and tracks in good repair. Neither party had the right to abandon the contract; but had the right after notice to fix upon new terms, and to call on arbitrators if they failed to agree, "to determine upon an equitable consideration for the privileges granted the appellee." If this use was worth, in 1866, as much as \$913, what was it worth in 1886, when this judgment was rendered, or at the end of the rental year next ensuing after the date of the notice? The population of the city had increased rapidly from the time of the contract made in June, 1866. The profit in conducting such a business becomes greater as the population increases. The value of the use of the franchise was, at the date of the notice, several thousand dollars annually, —greatly more than any of the parties contemplated; and, while the appellant is not entitled to the value of this use, it is evidently entitled to an equitable consideration; and what that consideration should be, is difficult to determine. If the parties regarded it as worth \$900 in 1866, it should be worth per annum, from June, 1881, the year ending after the date of the notice, as much as \$1500 per annum. The parties were evidently contract-

ing with reference to an increase in population when the question of consideration was left open, or could be changed upon notice given by the one party or the other; so, if the profits of travel increased or diminished, either company could avail itself of the advantage. Neither the value of the use of the franchise, nor the mere compensation for the use of the rails, formed the basis of the contract stipulations. The two companies acquired contract rights that are capable of being enforced upon equitable terms. The appellant will not be allowed to say that it must have the value of its franchise, or the appellee that it will only pay \$172 per annum as compensation. Neither view of the case would be equitable, or within the true meaning of the joint obligation. The surrender of the use of appellant's tracks for near thirty years to the appellee, when the city had by its contract with the appellee left it voluntary with the appellant as to its consent to the use, and at a point where the life of the city as to travel existed, was something more than a mere nominal consideration, and therefore it seems to us the compensation allowed by the chancellor is entirely inadequate.

The judgment is reversed, and the cause remanded, with directions to fix the compensation at \$1500 per annum from the 26th of June, 1881; the other stipulations in the contract to be as binding on the parties as if no change in the compensation had been made.

What Grant of Right to Build Railroad in Street Carries with it.—See *St. Louis, etc., R. Co. v. City of Belleville*, 32 Am. & Eng. R. R. Cas. 278; *Little Miami R. Co. v. Hambleton*, 14 Ib. 126; *Burns v. Multnomah R. Co.*, 10 Ib. 296.

CORPORATION OF THE CITY OF ST. THOMAS

v.

CREDIT VALLEY R. CO.

(15 Ontario App. Rep. 673.)

Railroad Company—Bonus—Failure to Run Train to Stipulated Point—Measure of Damages.—When the main consideration of a bonus to a railroad company was the bringing of its line to a certain town, and the running of its trains to a certain point in the town was a subsidiary agreement for the convenience of the town, in ascertaining damages for the breach of the subsidiary stipulation, every reasonable presumption may be made as to the advantages which might be derived from the broken agreement.

Same—Damages—How Ascertained.—When a municipality has contracted with a railway company for a station at a certain location within its corporate limits, in ascertaining the damage for failure of the company

to maintain a station at the stipulated point, depreciation in the value of property around the station, by reason of such failure, is a proper element for consideration, as showing how much less benefit has been derived by the city from assessments and taxable returns over the area affected by the station, in consequence of the company's breach of contract.

Same—Individual Damage—Suit by City to Recover.—The city is not a trustee for individuals who suffer loss or inconvenience from the abandonment of the station, and cannot recover damages for their use.

Same—Damage to City—Elements of.—The loss in taxation resulting to the city from the depreciation in taxable property, which can be traced to or reasonably connected with the company's default, forms a yearly standard which may be capitalized so as to fairly represent the money compensation to which the city is entitled.

APPEAL by the defendant from the report of the master of this court, in London, dated March 6th, 1886, pursuant to the judgment of Ferguson, J., of March 24th, 1884.

The action was brought for specific performance of an agreement entered into between the parties, whereby the defendants agreed for the consideration of \$50,000 in debentures of the city to "run their railway from the town of Ingersoll to the Canada Southern R., at some point not more than half a mile east of the present passenger station of the Canada Southern R. at St. Thomas, and that defendants' passenger trains should run to and from a small station on Church street, for the purpose of checking baggage and the accommodation of passengers."

In pursuance of this agreement the debentures were duly delivered to the railway company, and the company did run their railway from Ingersoll to St. Thomas, and for a brief period they ran their passenger trains to and from a small station on Church street, not laying a track of their own, but by a subsequent arrangement to which the city was not a party utilizing that of the Canada Southern R. Later they wholly discontinued to run trains to and from the small station on Church street, thereby committing the breach complained of.

The action was tried by Ferguson, J. (7 O. R. 332), who refused to enforce the plaintiff's claim for specific performance, but held that the railway company had committed a breach of the agreement, and directed a reference to the master at London as to the damages sustained by reason thereof.

The master made his report on March 6th, 1886, and found that the plaintiffs had sustained damages by reason of the breach of agreement by the defendants to the amount of \$12,000, and the solicitors for both parties assenting thereto, he found such damages to the date of his report.

He gave his reasons for arriving at this result as follows:

"1. The plaintiffs have sustained specific damages by the breach of the defendants' agreement.

"2. The defendants are therefore answerable for such damages.

"3. It is impossible to measure the damages so sustained, even approximately, unless by reference to the total amount of depreciation in assessment of the city of St. Thomas arising from the various causes appearing in evidence, to which causes the conclusion is to my mind irresistible that the wrong caused by the act of the defendants has very considerably contributed in the period covered by the evidence.

"4. It is clear, however, that the wrong declared has not been, even in that period, the only or the main cause of this depreciation, but there being direct evidence of gradual decline in assessment from the several causes referred to, to the extent of upwards of \$40,000, the defendants must be held responsible for some part of that loss to the plaintiffs.

"It is true that this loss has to a great extent been equalized in that time by private enterprise in the erection of buildings and improvements in the western part of the city, but this would have been so much gain to the city by increased values of assessable property had not the steady depreciation to which the act of the defendants was contributing been at the same time going on.

"It is, I think, a fair inference to be drawn from these facts that, notwithstanding the outlay in improvements by individual owners of property to some extent equalizes the loss to the city by declining assessments, the city is still suffering loss in income to which, but for the depreciation referred to, it would have been entitled to. Hence there was a specific loss to the city from this depreciation, to which the act of the defendants undoubtedly to some extent contributed.

"5. This being the case, it might appear that the true measure of damages would be simply the sum of \$20,000, the extra sum voted on the condition the breach of which forms the wrong here declared, because the majority for the full bonus of \$50,000 having been 55 votes, and no fewer than 32 of the witnesses having voted for that bonus on that condition only, it is fairly inferable that these 32 votes carried the by-law, and that the defendants having failed to carry out that condition, it might be said that the natural consequences would be that they should refund to the plaintiffs this sum of \$20,000.

"6. I do not find, however, as I have already indicated, that this ought to be the basis on which the question of damages should rest. The true basis, I think, is the loss upon the assessed values. I cannot conclude that the plaintiffs have sustained damage to the full extent of the surplus of \$20,000.

"The defendants to some extent carried out their undertaking, and have also in some degree made good to the city towards the east end the depreciation to which their wrongful act contributed in the western section; although in this connection I

do not find that their contention is by any means wholly sustained.

"7. Having, therefore, made a careful analysis of the whole evidence, and on perusal of several of the cases cited, to most of which I have had access, and adopting the principle that the wrongdoer or author of the mischief must be held responsible for the consequences of the wrong complained of to the party aggrieved, in damages, or a penal sum in compensation for the consequences following the wrong, I follow up that conclusion by finding that to the act of the defendants, as shown by the weight of the evidence adduced under this reference, must be charged a considerable part of the losses sustained by the plaintiffs in the past three and a half years, and I have fixed the proportion, \$40,600 (see evidence of J. P. Martin and H. Comfort), at a sum somewhat less than one third of the whole loss in that period as a fair and I think not excessive compensation for the defendants' proportion of the depreciation caused by their act, and I find that sum to be \$12,000.

"8. I have entirely rejected the contention of the plaintiffs as to other ways in which they could claim compensation in damages. They are too indefinite and vague, and it would be impossible to base even an approximate sum for damages upon the grounds suggested by counsel for the plaintiffs; and as to whether the defendants might even be called upon to construct an independent line into the city at a cost of \$75,000, to carry out the condition of which the breach is complained of, that, I think, is not now a question for me. It is disposed of by the judgment in appeal in this action. And with reference to the contention of the defendants that from the danger accompanying the passage of trains through the city their failure in the condition is a benefit rather than a loss, I have not given it much consideration because statutory enactments exist which can be enforced to prevent or at least to minimize the danger suggested.

"8. The evidence as to damages as a result of the wrong has, I think, been properly directed to the time between the date of the wrong complained of and the present, because such damage followed upon and was the necessary results of the wrong. I think I am warranted in so finding from the evidence, and in giving damages to the present time.

"Any further claim made by the plaintiffs for damages must be, it appears to me, the ground for a new action.

"The statute of limitations will in about two and a half years bar further action, as it will run from date of wrong (August, 1882)."

The grounds of objection as set out in the notice of motion for this appeal were (1) that the master improperly admitted

evidence of damages to particular individuals only residents in the plaintiffs' corporation, but not of damages to the plaintiffs as a corporation; (2) that the evidence upon which the master found the depreciation in the assessed value of the plaintiffs' property in the west end to be \$40,600 is contradicted by other evidence, and is contrary to the weight of evidence. That it is of too vague and general a character to support the said finding, and that the proportion of one third or thereabouts of \$40,600 in the said findings mentioned is only conjectural and not arrived at in any intelligible or legal manner; (3) that the evidence did not show that the breach of the agreement complained of had depreciated the plaintiffs' property as a whole; (4) the findings of said master, in so far as they award the said damages, are contrary to law and evidence, and the weight of evidence; (5) that the evidence showed that the depreciation complained of was altogether due to causes existing long before the defendants' railway was extended to St. Thomas, said causes being ones over which the defendants had no control, and for which they were not in any way responsible; (6) that the evidence showed that the plaintiffs had enjoyed the full benefit of the services of the defendants' railway, and that the present accommodation is more advantageous to the plaintiffs than the original arrangement, and combines with such advantages a higher degree of safety than formerly; (7) that the damages awarded are excessive and should in any event be materially lessened; (8) that in the evidence the plaintiffs had not shown that they had sustained any damages by reason of the breach complained of for which they were entitled to recover; that the report shall be amended accordingly.

The appeal came on for argument on March 1, 1888, before Boyd, C.

C. Robinson, Q.C., and R. M. Wells, for the Credit Valley Railway.

McCarthy, Q.C., and Ermatinger, Q.C., for the plaintiffs.

BOYD, C.—As stated by Hagarty, C.J., when this case was in appeal, 12 A. R., at p. 278, "The main object of the bonus of \$50,000 seems to be treated all round as the bringing the line to St. Thomas, the agreement as to Object of the bonus. trains for passengers and baggage at Church street being apparently subsidiary and a matter of local arrangement. (See Brown and Theobald on the Law of Railway Companies, 2d ed., pp. 110, 111.)"

In ascertaining damages for the breach of this last term, it must be considered that the stipulation as to the local service was intended to be of some benefit to the city. It may have been a minor matter, but was still of measurable importance.

Ascertainment of damages for breach of stipulation—Elements considered.

The obvious benefit intended by and in contemplation of both parties was, for the convenience of persons living in, and others going to, the west part of the city. All the passenger trains of the C. V. R. were to run to and from the small station on Church street for the purpose of checking baggage and the accommodation of passengers. But beyond this, which is expressed on the face of the contract, every reasonable presumption may be made as to the advantages which might have derived from the performance of the agreement. Thus in *Wilson v. Northampton v. Banbury Junction R. Co.*, 9 Ch. 279, where a railway had failed to put a station at the place bargained for by the plaintiff, Bacon, V.C., thought it was an element to be considered, in estimating his damages, that he had lost the increase in value of adjoining land, which, had the station been there, would have been capable of being adapted for building purposes. Following up the same line, the lord chancellor said, in appeal, at p. 286: "A jury might, with perfect propriety, take into account the probable benefit which the plaintiff's estate might have derived from the existence of a stopping-place to which traffic might have been attracted, or which might have been convenient to persons resident upon that estate." So in a later case, of *Jaques v. Millar*, 6 Ch. D., at p. 160, Mr. Justice Fry, varying the expression of the rule to be found in *Hadley v. Baxendale*, 9 Exch. 341, and *Cory v. Thames Iron Works Co.*, L. R. 3 Q. B. 181, said: "I am entitled to have regard to the damages which may be reasonably said to have arisen, . . . or which may be reasonably supposed to have been in contemplation of the parties as likely to arise, from the partial breach of the contract."

Church street station—Depreciation of value of property.

The failure to keep up the station at Church street might have, and might be expected to have, the effect of rendering the property in that neighborhood less desirable than it would otherwise be. Land and houses there might become less sought after and less salable or rentable, and, so, might actually depreciate in value instead of receiving the upward impulse which might be anticipated as one result of fixing a station at the west part of the city. These are elements, as Lord Selborne says in *Wilson's* case, no doubt more or less of an indefinite character, yet proper for the consideration of the master, for the purpose of showing how much less benefit has been derived by the city from the assessments and taxable returns over the area affected by this station in consequence of the railway's breach of contract. True, the actual depreciation is a matter which pertains to the property-owners, and not to the city as damages; but the lessened taxation resulting from this depreciation does not appear to me

to be too remote a fact for consideration upon the reference. This is a result which might not unreasonably be expected to occur; and if it is established as a matter of fact to the satisfaction of the master, it may, as a matter of principle, be included in his estimate of damage. *McMahon v. Field*, 7 Q. B. D. 591. As put by the judge in that case, this loss, if proved, appears to be a probable result or consequence of the closing of the station. See also *per Bowen, L.J.*, in *Grébert Borgnis v. Nugent*, 15 Q. B. D. 92.

It is clear that the personal loss or inconvenience suffered by travellers or citizens from the abandonment of the station, or the actual depreciation in value of the land individually owned in that neighborhood, cannot be reckoned as constituents *per se* of the damages suffered by the corporation. The city is not a trustee for these individual sufferers, and cannot recover damages for their use. *West v. Houghton*, 4 C. P. D. 197.

Personal losses.

But there are disadvantages following the closing of the station in that part of the city which naturally and probably operate to lessen the value of taxable property, and so diminish the municipal income from this source. That this line of inquiry as to damages is not too remote or conjectural appears to be recognized in the observations of Osler, J. A., in *corporation of Brussels v. Ronald*, 11 A. R. 605, 615. It helps materially to reach that which is the all important point, the ascertainment, as well as may be, of the pecuniary amount of the difference between the present state of things and what would have been if the contract had been fully performed. Stated broadly, the inquiry is, how much less benefit has been received by the municipality by reason of the railway service at one station being discontinued. That rule, enunciated by Richards, C.J., in *Cole v. Buckle*, 18 C. P. at p. 291, has been stated lately in England as the true measure of damages in a case like this of unusual character: *Wigsell v. The Corporation of the School for the Indigent Blind*, 8 Q. B. D. 357. The difficulty of ascertaining the amount is not a reason for withholding relief altogether: *Simpson v. London and Northwestern R. W. Co.*, 1 Q. B. D. at p. 277. I agree with the master that this is not a case in which no damages are proved, or in which only nominal damages should be given, the result of which finding would be that the action should be dismissed, and probably with costs. But I am not able to accept the amount awarded, which is excessive and is based on an erroneous foundation. The serious difficulty, to my mind, is because of the possible effect of the one and main station at the eastern side of the city accumulating advantages at that point which might have been distributed in the western

Damages suffered by municipality from closing station.

part had the small station been there maintained. However, the master, upon whom the duty devolved, and before whom the witnesses were examined, has been able to discriminate and to find that there has been depreciation around the area of the abandoned station which has not been compensated for by the prosperity around the existing station. There is, it is said, the distance of a mile between these two stations, and it may well be that the service at one point would not satisfy, as it should be satisfied, the requirements at the other points. At all events, that is what the city stipulated for—not one station, but two, and so situated that both sides of the town should be contemporaneously benefited. If the company admits that their small station is to be given up for all future time, then I think the damages should be assessed once for all: *Great Laxey Mining Co. v. Clague*, 4 App. Cas. 115. This may be done either by fixing one solid sum or by directing a yearly payment, as was suggested in *Wilson's case*, before Bacon, V. C., 9 Ch. App. 279. Had the master fixed some considerably smaller sum estimated upon a satisfactory principle, I should not have interfered. As I understand his reasons and findings, he has come to the conclusion that there is a depreciation of \$40,000 in assessable value in the eastern part of the city, and of this about \$12,000 is attributable to the default of the company. As the appeal was argued before me, and not disputed by the respondents, he came to this result because of evidence that \$40,000 worth of improvements had been made, which kept the assessments about the same in aggregate amount in 1881 and 1885. The witnesses Martin and Comfort say, "including the improvements, the assessed value is the same in these years." But the improvements, it is said, would only be assessed at 50 per cent of the value, and that would reduce the depreciation by one half. Of this total depreciation the master attributes one third (about) to the breach of contract on the part of the railroad. But it would be only the rate levied upon this one third (say 1½ cents on the dollar) which would be the proper measure of loss to the city as plaintiffs. I may be in error in these details, but I only go into them for the purpose of pointing out how the damages may be, in one aspect of the case, rightly estimated—that is to say, the loss in taxation resulting to the city from the depreciation is taxable property which can be traced to or reasonably connected with the company's default, forms a yearly standard which may be capitalized so as to fairly represent the money compensation to which the plaintiffs are entitled.

I have, perhaps, not exhausted the grounds upon which liability to damages can be placed. I have experienced the force of the observation of Mr. Justice Field in the *Wigzell case*, 8 Q. B. D. 357, which is very pertinent to this case. "It is," he

says, "one of a somewhat unusual character, and involves questions as to the principle upon which damages ought to be assessed, few questions upon which point are free from difficulty," p. 359.

As now framed, the report must be set aside. It is not my province to seek out what further, if any, grounds exist for the recovery of substantial damages. It is enough that the law and evidence does not warrant the conclusion to which the master has come. The matter is therefore referred back for any further or other claim and evidence which may be adduced. I cannot but suspect, however, that some such case as this inspired or exasperated the utterance of a former master in chancery who differentiated between the functions of court and master by saying that all the difficult matters went to the master and all the easy ones to the court.

Master's report set aside.

I may note that I have carefully read all the American cases cited, but they seem to me to be at variance with the views expressed by English and Canadian judges as to what is admissible evidence of damage in cases of this kind. There is one case, not cited, of *Watterson v. Allegheny Valley R. W. Co.*, 74 Pa. St. 208, which goes the other way, and is in harmony with *Wilson v. Northampton and Banbury Junction R. W. Co.*, 9 Ch. 279.

The costs of this appeal must be given in favor of the appellants.

Damages for Removal or Abandonment of Railway Station.—See *Houston & T. C. R. Co. v. Molloy*, 25 Am. & Eng. R. R. Cas. 244.

GULF, COLORADO AND SANTA FE R. CO. *et al.*

v.

STATE OF TEXAS.

(*Texas Supreme Court, December 21, 1888.*)

Railroad Companies—Traffic Association—Invalidity.—An agreement between several railroad companies, some of which own and control competing lines, for the appointment of a common governing committee or an association composed of one member from every company to fix the rates for which freights should be carried to and from points within the state of Texas, is illegal because contrary to art. X, sec. 5, of the constitution of Texas, which provides that "No railroad, . . . or managers of any railroad corporation, shall consolidate the stock, property, and franchises of such

36 A. & E. R. R. Cas.—31

corporation with. . . or in any way control, any railroad corporation owning or having under its control a parallel or competing line."

Same—Stifling Competition—Constitutional Law.—The language of this provision of the constitution of Texas evinces that control in any manner and to any extent was intended to be prohibited, provided it was such as is calculated to enable one railroad, by means of a contract or agreement for interference in the others' affairs, to keep down competition between them.

Same—Injunction—Public Policy.—*Quare*, whether, even in the absence of such constitutional provision, action under the agreement could not be enjoined as being in restraint of competition and contrary to public policy.

Same—Competition—Judicial Notice of.—In such a suit, the court must take judicial notice of the fact that two railroads touching the same point are competing lines.

Same—Provisions of Contract—Effect of.—The fact that any company or party to the agreement has the right of withdrawal, or that it cannot be punished for a failure to obey the regulations, or that it has not been shown that the companies have made charges in excess of the limits allowed by law does not relieve the agreement from its illegality.

Same—State Control—Interstate Commerce.—Several of the defendant companies being corporations created by the state of Texas, the state of Texas has the right to prohibit and interfere with a contract in restraint of competition to which they are party, although it regulate charges upon freight carried to and between Texas and other states. The agreement being illegal as to some, is illegal as to all.

BILL in equity. Appeal from Travis County.

George W. McCrary, Baker, Botts & Baker, and J. W. Terry for appellants.

J. S. Hogg, attorney-general, for appellee.

GAINES, J.—This suit was brought in the name of the state, by her attorney-general, to restrain certain railroad companies engaged in operating lines within the state from carrying out an agreement, entered into by them, by which they committed to a body of representatives of the companies the power to fix the rates for which freights should be carried to or from points within the state.

The theory of the state's case is that the parties to the agreement are parallel and competing lines, and that the association formed by it is prohibited by section 5, article X, of the constitution, which provides that "No railroad, . . . or managers of any railroad corporation, shall consolidate the stock, property, or franchise of such corporation with, . . . or in any way control, any railroad corporation owning or having under its control a parallel or competing line."

The first assignment of error is that "The court erred in finding that many of the railroad companies defendant own and control parallel and competing lines; because, as defendants claim, there is no such admission in the answers; nor is there such an allegation in the state's petition, except that defendants are averred to be made parallel

Theory of state.

Assignment of errors.

and competing lines by the action of said Texas Traffic Association." Under this assignment, we will first consider the allegations in the petition. The petition alleges the authority by which the respective charters of the defendant corporations were granted, and defines the lines of railroad respectively operated by them, and then charges "That the lines so owned and operated by the defendants are the main trunk lines and leading railways in Texas, and so traverse the state as to touch and penetrate her commercial centres, and become and are lawful competitors for the country's traffic concentrated in the cities aforesaid." After alleging the formation of an executive committee of the "Traffic Association" by the agreement the carrying out of which is sought to be restrained, the petition also avers "That each of said executive committee, and each of the employees of said association, is an officer of each and all the defendants, . . . and are in common employed and paid by them; and that each of said railroad companies is a competing line for Texas traffic and trade." Also referring to the association formed by the agreement, the petition charges, "That said railway companies, by their said conspiracy, contract, combination, and copartnership, have formed a consolidation of parallel and competing lines, etc." The exceptions to the petition are upon grounds that would have been raised by a general demurrer. There is no exception on account of vagueness or indirectness of the allegations. In the absence of such an exception, every reasonable intendment must be indulged in favor of the sufficiency of the petition. See District Court Rules 17 and 18, 47 Tex.; *Burks v. Watson*, 48 Tex. 108.

Allegations of
petition.

We think it sufficiently appears, from the allegations quoted above, that the defendant companies are alleged to be owners and operators of parallel and competing lines of railroad; but the further question is presented, whether, from the admissions in the pleading and facts of which the court could take judicial notice, it was authorized to make the finding complained of in the assignment of error. The case was submitted to the court for final disposition upon the petition, the answers, and the supporting affidavits.

Allegations as
to competing
roads suffi-
cient.

The answers of the Gulf, Colorado & Santa Fé R. Co., and of the Fort Worth & Denver City R. Co., formally admit all allegations of the petition which are not therein specifically denied. The St. Louis, Arkansas & Texas R. Co. adopt the answer of the Santa Fé Co. The answers of these defendants do not deny the roads of defendant companies are parallel or competing lines; therefore the fact may be considered established as to them. On the other hand, the other defendants, in their answers, deny all the allegations of the petition not specifically admitted

Answers of de-
fendants—Jud-
icial notice
as to compet-
ing lines.

in such answers; and we find in their pleadings no admission that any one of the railroads is parallel to or a competitor for traffic with any other. Unless, therefore, the court could know judicially that two or more of the roads which were operated by the members of the association were parallel or competing lines, the finding was not warranted against the last-named defendants. In Wharton on Evidence, it is said: "Our own law . . . adopts the position that reason and evidence are the co-ordinate factors which go to make up proof, and that a judge, in trying a case, must not only exercise his own logical faculties in construing and applying evidence, but must draw on his own sources of knowledge for such information as is common to all intelligent persons of the same community. Such information must not only be thus common, but must be of undisputed truth. When it becomes disputable, it ceases to fall under the head of notoriety." 1 Wharton Ev. § 329. The supreme court of the United States say: "It certainly cannot be laid down, as a universal or even as a general proposition, that the court can judicially notice matters of fact. Yet it cannot be doubted that there are many facts, particularly with respect to geographical positions, of such public notoriety, and the knowledge of which is to be derived from other sources than parol proof, which the court may judicially notice. Thus, in the case of *U. S. v. La Vengeance*, 3 Dall. 297, the court judicially noticed the geographical position of Sandy Hook; and it may certainly take notice judicially of like notorious facts, as that the Bay of New York, for instance, is within the ebb and flow of the tide." *Beyroux v. Howard*, 7 Pet. 324. "A court is bound to take judicial knowledge of the leading geographical features of the land, the minuteness of the knowledge so expected being in inverse proportion to the distance." 1 Whar. Ev. § 339. The principle has been applied in various ways, as the following cases will show: *Tremier v. Stewart*, 55 Ala. 458; *Gibson v. Stevens*, 8 How. U. S. 399; *Vanderwerker v. People*, 5 Wend. 530; *Pierce v. Langfit*, 101 Penn. St. 507; *Steinmetz v. Turnpike Co.*, 57 Ind. 458; *Tewksbury v. Schulenberg*, 41 Wis. 384; *Walker v. Allen*, 72 Ala. 456; *Oppenheim v. Wolf*, 3 Sandf. Ch. 571; *Neaderhouser v. State*, 28 Ind. 257. In *Railway Co. v. Rushing*, 69 Tex. 306, Chief Justice Willie says: "It may be that this court, judicially knowing the geography of the state, might take notice of the general direction of those two roads as fixed by the statutes under consideration; that their lines must necessarily cross each other; and could therefore treat them as connecting lines, and not parallel to each other: but as to whether they are competing lines, we can have no judicial knowledge whatever." This latter proposition, as a general rule, and as applied to the case then before the court, is undoubtedly correct.

Whether two roads which intersect each other at a certain point are competitors for freight or not must depend upon a variety of circumstances not known to the court; but the authorities cited show that we must take notice of the geography of the state and at least of its navigable streams. It is a matter of history that important lines of railroad once established have remained as fixed and as permanent in their course as the rivers themselves. They supersede in the main all other modes of travel between the points which they touch, and become as well if not better known than any other geographical feature of the country. Their locality becomes "notorious and indisputable." For instance, can we doubt that the Houston & Texas Central Road runs from Houston to Dallas? and that the Gulf, Colorado & Santa Fé touches with its lines the same points? Can we doubt that they run, during a considerable portion of their lines, practically parallel to each other? and that they must necessarily compete for the traffic lying between them? We think we must take judicial notice that these two roads are parallel and competing lines; and this is sufficient, so far as the disposition of this case is concerned. We are of opinion that the finding would have been sufficient to support the judgment if it had been that but two of the defendants were competitors with each other for traffic. The same may be said as to portions of the lines of the Texas & Pacific Co., and of the St. Louis, Arkansas & Texas Co., which extends from Sherman to Texarkana. We cannot shut our eyes to the notorious and indisputable facts that these parts of the respective lines touch at the same points, and that they are natural competitors for the traffic of a large scope of country.

Under the next succeeding assignments of error, it is insisted by counsel for appellants that the agreement in controversy which establishes the "Texas Traffic Association," is not in violation of section 5, article X, of the constitution. In order to determine this question, we will give briefly some of the prominent provisions of the articles of agreement by which the association is created. Among its purposes, stated in the preamble, is that "of preventing sudden and extreme fluctuations in Texas rates alike injurious to the public and to transportation companies." Article I provides that the "traffic subject to this agreement shall be all freight and passenger business, except express and mail, carried by lines, parties hereto, which has origin or destination within the state of Texas, other than business to or from El Paso, Eagle Pass, and Laredo proper." The managing body of the association is an executive committee, composed of one member from each party to the agreement. They are to elect a commissioner, who is chief executive officer. "The executive

Constitution-
ality of agree-
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association.

committee shall agree upon the classification and rates covering the traffic subject to this agreement. No member shall directly or indirectly reduce rates," etc. Any violation of the agreement is to be reported to the commissioner, who shall "check the irregularity if he can." "All rates, rules, regulations, and divisions, when adopted by agreement or by arbitration, shall be simultaneously furnished by the commissioner to the traffic departments of all members of the association for the guidance of all the parties in interest," etc. Without quoting further, we think it apparent that a leading object, if not the sole object of the association, is, by the appointment of a common governing committee, to fix rates of transportation so as to prevent competition among the several parties to the contract. We think it also apparent, from the language of the section of the state constitution, that its leading object was to prevent competing lines of railroad in the state from so fettering themselves by consolidation, lease, or other agreement by which one should in any way subject itself to the control of another, so as to stifle competition for the traffic of the state. The section prohibits any railroad company, or the managers of any such company, from controlling in any way another company owning a competing line. If one is prohibited from making such a contract, we think two or more are so prohibited; and that when one company enters into an agreement with others, any one of which owns or controls a competing line of railroad, by which it subjects itself to the government of a body appointed by all parties to the agreement, that such company places itself under the control of the other to a definite extent, and acts in violation of the constitution of the state. The manner and extent of the control are immaterial. The language of the constitution clearly evinces that control in any manner and to any extent was intended to be prohibited, provided it was such as is calculated to enable the one railroad, by means of a contract or agreement for an interference in the other's affairs, to keep down competition between them. But it is insisted that because a unanimous vote of the committee is required to adopt any proposition involving revenue; because the rates are subject to be changed in a certain manner pointed out in the agreement; because any member may withdraw upon giving ninety days' notice; and because no penalty is prescribed for a violation of the articles, the agreement does not subject one road to the management or control of another. But it is apparent, that as long as one company remains a member of the association, it is controlled as to rates by the executive committee, and is not free to enter into competition with its associates for freights. It may be that by its representative refusing his assent to any proposition—fixing rates in the first instance—that it could not be controlled in this

respect ; but when once fixed, it would be powerless to secure a change without the consent of the representatives of the others ; besides, the executive committee, upon its appointment, are made, to the extent of their powers, managers of all the companies ; and hence, when a company subjects itself to the power of the committee by entering the association, it places itself under the control of the managers of other railroads.

We cannot see that the fact that a member has the right of withdrawal, or that it cannot be punished for a failure to obey the regulations, can make any difference as to this question. If any one of defendants had withdrawn when this suit was filed, the allegation of that fact would have been an answer, as to that company, to

Right of withdrawal, etc., immaterial.

the state's petition ; but it is further argued, that because it has not been shown that they have made charges for freight or passengers in excess of the limits allowed by law, their action is not illegal. But we do not understand that the state seeks to restrain them for illegal charges made under the direction of the association, but for doing an illegal thing in entering into and carrying out the terms of the agreement for the association. It is not quite clear to our minds that even in the absence of the constitutional provision we have had under discussion, the defendants' association could not be enjoined as being in restraint of competition and contrary to public policy. But it is further insisted, that because the agreement in question concerns inter state commerce, neither the state, in its political capacity, nor its courts have any jurisdiction over the matter. We understand the agreement to

Effect of agreement on interstate commerce.

embrace both commerce within the state and commerce between this state and other states. The former might be enjoyed if the latter could not. We are inclined to the opinion, that if none of the corporations composing the association owed their existence to our laws, the state would have no power to prohibit or interfere with a contract of this character in so far as it regulated charges upon freight carried to and fro between this and other states. *Wabash, etc., R. Co. v. People*, 118 U. S. 557 : s. c., 26 Am & Eng. R. R. Cas. 1. But we think we have here a very different question. Several of the defendant corporations are chartered under the laws of this state, notably the Gulf, Colorado & Santa Fe R. Co. and the Houston & Texas Central R. Co. If we are correct in our conclusions, we think it follows that the defendant corporations who derive their charters from this state are acting in violation of law in entering into this contract of association, some of the members of the association being competing lines of road. We think, that, the association being illegal as to some of the defendants is illegal as to all. It may be, that should the companies which have

their charters from the United States, or from other states, come into this state and enter into a similar arrangement among themselves, the state would be powerless to interfere, because of its being a matter within the exclusive jurisdiction of the United States. Their contract might not be in violation of our laws, because we could make no laws interfering with interstate commerce. But it does not follow that they would enjoy the immunity of entering into contracts with our own corporations, which are prohibited to the latter, and thus enable them to set at nought the limitations to their powers. There are certainly many things the state may do in exercise of its police powers, which may affect commerce between the states or between this state and foreign countries; but how far the police power of the state may extend, so far as it affects the question before us, we need not inquire. We are of opinion that the association under consideration is clearly illegal, as to some of the parties to it; and that, being illegal as to some, it is illegal as to all, and may be restrained. The judgment is therefore affirmed.

Validity of Traffic and Pooling Contracts Between Different Railway Companies.—See, generally, *Elkins v. Chicago, etc., R. Co.*, 11 Am & Eng. R. R. Cas. 579; *State v. Concord R. Co.*, 13 Ib. 94; *Missouri Pac. R. Co. v. Texas & Pac. R. Co.*, 28 Ib. 1, note, 13; *Central Trust Co. v. Ohio Cent. R. Co.*, 23 Ib. 666.

PEORIA AND PEKIN UNION R. CO.

v.

CHICAGO, PEKIN AND SOUTHWESTERN R. CO.

(127 U. S. 200.)

Receivers—Use of Road and Terminal Facilities—Rent Charges.—Where a railroad company, having leased a connecting road, enters into a contract with other connecting companies by which it is in fact owned, giving them the right to use its tracks and terminal facilities for a fixed rent, and thereafter demands the execution of a similar contract by the receiver of another company, who previously had the use of the line, to which the receiver objects on the ground that the term are exorbitant and oppressive, and that he has no authority to execute such contract without the order of the court, whereupon it is agreed that the company shall enjoy like privileges, paying like terminal charges as the other companies, the rent not being fixed, but to be left to the determination of the judge, and the same rate as previously paid to be paid in the mean time,—the amount paid by the other roads pursuant to such contract does not in the absence of evidence showing that the sum paid by

the receiver is not, all that the use of the road is fairly worth, furnish the measure of damages for such use.

APPEAL from Circuit Court of the United States for the Northern District of Illinois.

Petition by an intervenor in a suit to foreclose a railway mortgage, in order to compel the receiver of the mortgaged property to pay rent. The petitioner appeals from a decree dismissing the petition. The case is stated in the opinion.

Wager Swayne for appellant. *Mr. C. Walter Artz* was with him on the brief.

Thomas S. McClelland for appellee.

GRAY, J.—Pending a suit in equity by the Farmers' Loan & Trust Co. against the Chicago, Pekin & Southwestern R. Co., to foreclose a mortgage of its road, the Peoria & Pekin Union R. Co. filed this intervening petition to compel the receiver of the defendant company, appointed in that suit, to pay to the petitioner the sum of \$16,231.55 for rent of tracks and terminal facilities at Peoria from February 1, 1881, to March 1, 1882. Statement of case.

From the documents in the record, and the very argumentative and somewhat conflicting affidavits of Cohr, the vice-president and general counsel of the petitioner, and of Hinckley, formerly the president and now the receiver of the defendant, the material facts appear to be as follows: Facts.

Peoria and Pekin are ten miles apart, on opposite sides of the Illinois river, and connected by two lines of railway tracks—that of the Peoria & Springfield R. Co. on the east side of the river, and that of the Peoria, Pekin & Jacksonville R. Co. on the west side of the river, and each crossing the river on a bridge. Connecting with these at Peoria or at Pekin are the lines of four other railroad companies—the Wabash, St. Louis & Pacific R. Co., the Indiana, Bloomington & Western R. Co., the Peoria, Decatur & Evansville R. Co., and the Peoria & Jacksonville R. Co.

The petitioner was organized in 1880, its whole capital stock being owned by these four companies, one quarter by each. On February 1, 1881, the petitioner, having obtained a lease of the Peoria & Springfield R., and acquired by purchase the Peoria, Pekin & Jacksonville R. and having improved the terminal accommodations and facilities at Peoria, entered into a contract in writing with the four companies aforesaid, by which it leased to them for fifty years the tracks between Pekin and Peoria, with the use of its terminal accommodations and facilities at Peoria; and each of the four companies agreed to pay a yearly rent of \$22500 and a proportionate share of the expenses of maintain-

ing the terminal accommodations at Peoria and of terminal services, according to the business done by each: and it was further agreed as follows:

"Eighth. Any other railroad company, whose road shall now or hereafter run into said city of Peoria, or that shall desire to procure an entrance into said city, shall be allowed to acquire the same rights and privileges as the said several lessees, but no other, and upon no less rental, upon entering into a like contract hereto with the party of the first part, except as to representation in the board of directors of the party of the first part and ownership in its capital stock."

Before February 1, 1881, the trains of the defendant company had been run over the road of the Peoria & Springfield R. Co. at a rate of compensation fixed by agreement between the receivers of those two companies.

On February 1, 1881, Cohr, in behalf of the petitioner, demanded of Reed, then the receiver of the defendant company, that he should enter into or contract to pay, during his receivership, the same rent and other charges as the four companies, and insisted that he had no authority to allow the use of the petitioner's tracks on any other terms. Reed objected that the terms demanded were exorbitant and oppressive, and that he had no authority to assent to them without an order of the court. And it was thereupon agreed that the defendant company should enjoy the use of the tracks and the terminal facilities, and should pay the like terminal charges as the four companies, and should also pay such rent from February 1, 1881, as should be determined by Judge Drummond, upon an application to be forthwith made by Reed; and that, until such determination, the defendant company should pay at the same rate as formerly paid to the receiver of the Peoria & Springfield R. Co., and should pay the residue, if any, when the judge should so determine.

Pursuant to this agreement, Reed made an application in writing to Judge Drummond, who, as Cohr testifies, in December, 1881, or early in 1882, informed him that he declined to decide upon it, and that, unless the defendant settled with the petitioner by March 1, 1882, the petitioner might shut out the defendant from its tracks. Upon notice to that effect, Reed declined to pay, and on March 1, 1882, ceased to use the tracks of the petitioner.

The defendant paid the petitioner for the use of its tracks and terminal facilities from February 1, 1881, to March 1, 1882, at the same rate as previously paid to the receiver of the Peoria & Springfield R. Co., amounting to \$17,537.83. The petitioner claimed for the same period the sum of \$9394.38 for terminal expenses, and the sum of \$24,375 for rent: and applied the sum

received from the defendant to the payment in full of the first of these claims, and in part of the second, leaving \$16,231.55, which the petitioner now sought to recover.

The master, to whom the petition was referred, reported that there was nothing before him which enabled him "to report the amount of compensation which the petitioner should have, except as the result of the conditions upon which the receiver continued to use the property after the attempted making of a contract between the parties resulting in the notice referred to," but found, "from their relations, and the implied understanding upon the part of the receiver arising from them," that the sum claimed was due from the defendant to the petitioner.

The circuit court sustained exceptions taken by the defendant to the master's report, and dismissed the petition. Its opinion, which is not made part of the record, is reported in 18 Fed. Rep. 484. The petitioner appealed to this court.

The only matter in dispute is whether the defendant is liable to the petitioner by way of rent from February 1, 1881, to March 1, 1882, for anything more than has already been paid. There is no more ground for implying an assent by the defendant to the claim of the petitioner than for implying an assent of the petitioner to the position of the defendant. When the petitioner demanded of the receiver of the defendant the like rent, as well as the like rate for terminal expenses, as was to be paid by the four companies, the receiver of the defendant declined to assent to the demand without an order of the court whose officer he was. The parties thereupon came to a temporary arrangement by which the defendant agreed to pay the terminal expenses demanded, and the parties submitted the question of rent to the circuit judge as an arbitrator; and it was agreed that, until his determination, the defendant should continue to pay the same charges that it had paid before February 1, 1881.

**Liability of
defendant for
rent.**

By the terms of that agreement, then, the amount of rent to be paid by the defendant was left uncertain and dependent upon the award of the judge. The affidavit of the petitioner's own witness shows that the judge, after some delay, declined to act as an arbitrator. The judge's view upon the subject appears in the opinion afterwards delivered by him in the circuit court, in which he said: "On looking into the question at the time, the judge was of the opinion that the contract which was demanded of the receiver by the Peoria & Pekin Union Co. was oppressive in its terms, and doubted whether the receiver could afford to pay the prices then demanded, but at the same time, admitting that the Peoria & Pekin Co. was the owner of the property, and that it had the right to prescribe on what terms the receiver should do his railroad business between Pekin and

Peoria and in the latter city, stated that, if the receiver would not accept the terms, he could not be permitted to have the use of the property of the Peoria & Pekin Union Co." The judge, while he recognized the right of the petitioner, as owner of the property, to exclude the defendant from its use if the defendant would not accept the petitioner's terms, in no way intimated that, upon the facts of the case, the defendant could be held to have accepted those terms.

There is no evidence tending to show that the sum paid by the defendant is not all that its use of the property was fairly worth. The rent, which each of the four companies who owned all the stock of the petitioner company agreed by express contract to pay that company, affords no test of what is a reasonable rent as between the petitioner and a stranger, like this defendant, who has no interest in its stock and was no party to that contract. As observed in the opinion of the circuit court, "The Peoria & Pekin Union Co. was really owned by the other companies which made the agreement with it, and consequently they were substantially owners of the property of the Peoria & Pekin Co. It was substantially a contract, therefore, made by one party with itself, which, it was insisted, should be the test of payment by the receiver."

Decree affirmed.

BALTIMORE AND OHIO R. CO.

v.

WALKER.

(45 *Ohio State*, 577.)

Crossings—Watchman at—Liability of Lessee.—Under Ohio Rev. Stat. sec. 3333, providing that when the tracks of two railroads cross each other or in any way connect at a common grade, the crossing shall be made and kept in repair, and a watchman maintained thereat, at the joint expense of the companies owning the track, etc. A company having the possession and control of a road in Ohio, which is in the management and operation of such road as lessee, is a company "owning the track" of such road, in the sense in which that phrase is used in the statute.

Same—Expense—Contribution.—Under that statute the burden is common to both companies, and if either performs the whole duty and pays

the entire expenses, it may compel contribution by the other to the extent of its equal portion thereof.

ERROR to Circuit Court of Knox County.

On the 2d day of January, 1882, Goshorn A. Jones, receiver of the Cleveland, Mt. Vernon & Delaware R. Co., filed his petition in the court of common pleas of Knox county, against the Baltimore & Ohio R. Co., alleging "that the said Cleveland, Mt. Vernon & Delaware R. Co. is a corporation created and organized under the laws of the state of Ohio, and, under said corporate name, built, constructed, and operated a line of road extending from Hudson to Columbus, O., by the way of Akron and Mt. Vernon, O., and has conducted and operated said railroad under said corporate name from about the 1st of July, 1873, up to the 1st day of December, 1881; that on or about the 27th day of September, 1880, the said Goshorn A. Jones was, by the judge of the court of common pleas within and for the county of Summit, O., in a certain proceeding therein pending against said Cleveland, Mt. Vernon & Delaware R. Co., appointed receiver of said railroad company, which position he accepted by executing a bond to the acceptance of said court, and entered upon the discharge of his duties as receiver; that he is still acting in the said capacity.

"The said plaintiff says that the said defendant, the Baltimore & Ohio R. Co., is a foreign corporation, created and organized under the laws of the state of Maryland, and is now and was on the 1st day of July, 1873, the lessee of the Sandusky, Mansfield & Newark R. Co., a corporation created and organized under the laws of the state of Ohio; and as such lessee the said defendant manages, controls, and operates the line and track of said Sandusky, Mansfield & Newark R. Co., from the city of Sandusky to the city of Newark, in said state of Ohio, and through the county of Knox and a portion of the city of Mt. Vernon, and the said defendant, the Baltimore & Ohio R. Co., runs its passenger and freight trains, locomotive engines, and cars, and machinery over and upon said track and line of road.

"The said plaintiff says that the railroad track of said Cleveland, Mt. Vernon & Delaware R. Co., and the railroad track of the Baltimore & Ohio R. Co. on the Lake Erie Division, a short distance southward of Mt. Vernon, O., cross each other at a common grade; that the crossing at said point was made and constructed by the said Cleveland, Mt. Vernon & Delaware R. Co. about the 1st day of July, 1873; that all the material used and labor performed in constructing said crossing, including the materials used and labor performed in building the watchman's house, were all furnished, supplied, and paid for by the said Cleveland, Mt. Vernon & Delaware R. Co.; that said crossing

and house for a watchman was done and constructed for the common interest, benefit, and necessity of the Cleveland, Mt. Vernon & Delaware R. Co. and the defendant, Baltimore & Ohio R. Co.; the plaintiff says that, from the 1st day of October, 1873, the said Cleveland, Mt. Vernon & Delaware R. Co. has kept, maintained, and paid the salary of a competent watchman, who performed all the necessary work, labor, and services required by the laws of Ohio; that the services of said watchman were for the mutual benefit of the said plaintiff and the said defendant, and such as was and is required by the laws of Ohio to be kept and maintained at railroad crossings.

"The said plaintiff says that the amount of expenditure necessary to be made for the construction and repairs and maintenance of said railroad crossing, with the amount paid the watchman, erection of the watchman's house, from said 1st day of October, 1873, to the 1st day of December, 1881, amounts, with interest, to the sum of \$5789.05. An itemized statement of said account of expenditures is hereto attached, marked 'Exhibit A,' and made a part of this petition.

"The said plaintiff further says that said defendant became and was liable to bear and pay one half of said expense, and the said defendant is now indebted to the said plaintiff in the sum of \$2894.52, the one half of the said sum of \$5789.05, the amount paid out and expended by the said plaintiff as aforesaid, with interest included.

"The plaintiff has frequently requested and demanded of the said defendant payment of the said sum due the plaintiff, which the said defendant has refused to pay, or any part thereof.

"There is now due from said defendant to said plaintiff the said sum of \$2894.52, for which sum of \$2894.52 the plaintiff prays judgment against said defendant, with interest from the 1st day of December, 1881."

The itemized account attached to the petition as "A," commences July 1, 1873, and ends December 15, 1881. The first item is for "crossing-frogs," and the next, dated October 1, 1873, is for "material furnished and labor performed in building the watchman's house;" then follow regular monthly charges for amounts paid the watchman, and regular annual charges for amounts paid for signal supplies, with interest on each charge to December 1, 1881.

The defendant demurred "to all the items in said account, which accrued prior to January 2, 1876," on the ground that they were barred by the statute of limitations,—more than six years having elapsed from their date, before the commencement of the action. The demurrer was sustained by the court, and the defendant then answered as follows:

"Answering to so much only of plaintiff's petition and pre-

tended claim against this defendant as remained after the sustaining of the court of the demurrer of the defendant, filed heretofore in this case, to certain parts and items of said petition, as more fully appears of record, it denies that defendant became and was liable to bear and pay any part of said expense of putting in said crossing and watchman's house, and maintaining the same, or any part of the expense of maintaining a watchman at said crossing; and denies that defendant is now, or ever was, indebted to said plaintiff or to said Cleveland, Mt. Vernon & Delaware R. Co., by reason of the putting in and maintaining said crossing, watchman's house, and maintaining said watchman at said crossing, in any sum whatsoever; for defendant avers that at the time of putting in said crossing, and building said watchman's house, as averred and stated in said petition, the said Cleveland, Mt. Vernon & Delaware R. Co., for a valuable consideration then and there received by the said Cleveland, Mt. Vernon & Delaware R. Co. from and by this defendant, then and there paid and delivered to said Cleveland, Mt. Vernon & Delaware R. Co., agreed and contracted with this defendant to put in said crossing and furnish all material therefor, and furnish all material and build said watchman's house, and forever keep up and maintain said crossing and said watchman's house, and forever to keep and maintain a watchman at said crossing,—all at the expense and costs of said Cleveland, Mt. Vernon & Delaware R. Co.; and this defendant to pay or bear no part of the expense of constructing said crossing or watchman's house, and no part of maintaining or keeping the same in repair, and to pay no part of the expense of maintaining said watchman at any time.

"And defendant avers that, in pursuance of said arrangement and contract, the said Cleveland, Mt. Vernon & Delaware R. Co. did, at the time mentioned in said petition, put in said crossing and build said watchman's house, and has ever since maintained the same, and has ever since maintained and employed a watchman at said crossing,—all at the proper expense of said Cleveland, Mt. Vernon & Delaware R. Co., which last-mentioned company has never claimed, pretended, or intimated, until within a very short time prior to the commencement of this suit, that said defendant should be chargeable with any part of said expense."

The answer contains a second defence, pleading the statute of limitations to such items as accrued less than six and more than four years before the action was commenced. This, of course, was no defence, was not relied upon, and need not be further noticed.

The reply admits "that plaintiff furnished all the material put in said crossing, erected the watchman's house, and has ever

since maintained the same and paid the watchman; and the plaintiff denies each and every statement and allegation in said answer contained, not expressly admitted and set out in the petition."

It appears from the record that, while the action was pending in the court of common pleas, Jones ceased to be receiver, and that George D. Walker, who had been appointed his successor, was, by consent of the parties and the order of the court, substituted as party plaintiff; and thereupon the cause was submitted to the court, and judgment rendered for the plaintiff. The motion of the defendant for a new trial was overruled, and a bill of exceptions was duly taken, which states that "the said cause was submitted to the court on the pleadings alone, and no testimony was offered by either party to sustain the issues made by the pleadings herein," and that the court "rendered judgment against the defendant, and in favor of the plaintiff, on the pleadings."

The defendant prosecuted error to the circuit court, where the judgment was affirmed, and then filed his petition in error in this court to reverse those judgments.

Cooper & Moore and J. H. Collins for plaintiff in error.

H. H. Greer for defendant in error.

WILLIAMS, J.—The case was submitted to the court of common pleas upon the pleadings, and some questions are raised here as to their effect, which will be noticed before considering the more important questions in the case.

It is first claimed that it was error to render judgment for the plaintiff without proof of the value of the items of the account attached to the petition, because the allegations of their value were not admitted by the failure to controvert by answer. The petition, however, does not seek to recover the value of the services of

Proof of value
of items—Ad-
mission by an-
swer.

the watchman, or of the signal supplies, but the amounts paid and expended by the plaintiff therefor. There are no allegations of value in the petition to be controverted by answer, or considered as controverted by failure to answer; and if there were, the court might in its discretion render judgment without proof. It has been held by this court that, where judgment is rendered in default for answer in such case, without requiring proof, there is no error for which the judgment will be reversed. *Dallas v. Ferneau*, 25 Ohio St. 635. And the reasons for so holding apply with equal force to cases where the defendant answers, leaving unchallenged the items of the account, and defends upon another and distinct ground,—such as payment, or, as in this case, that the defendant, by agreement between the parties, was exonerated from payment, and

consents to the submission of the case, without questioning the correctness of any item in the account.

Again, it is claimed by the plaintiff in error that the answer puts in the averments of the petition, because it denies "that the defendant became liable to bear any part of the expense of putting in the crossing and watchman's house, and maintaining the same, or any part of the expense of maintaining the watchman at the crossing." And also denies "that the defendant is now, or ever was, indebted to the plaintiff or to the Cleveland, Mt. Vernon & Delaware R. Co. by reason of the putting in and maintaining said crossing, watchman's house, and watchman at said crossing, in any sum whatever."

Answer putting in averments of petition.

These denials are mere conclusions of law on denials of such conclusions. *United States R. S. Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 467; *Larimore v. Wells*, 29 Ohio St. 13; *Knox County Bank v. Lloyd*, 18 Ohio St. 353.

Besides, they are to be regarded as conclusions of the pleader, from the statement of facts accompanying them and which constitutes the real defence. It will be noticed that the defendant denies the liability and indebtedness to the plaintiff; "for it avers" that the Cleveland, Mt. Vernon & Delaware R. Co. agreed with the defendant, for a valuable consideration paid it by the defendant, to put in the crossing, build the watchman's house, and forever keep the same in repair, and maintain the watchman at the crossing at its own expense and without cost or expense to the defendant; and that it was in pursuance of this agreement that the expenditure mentioned in the petition was made. Looking to the whole answer, its proper construction and effect is that, because of the facts so stated, it is not liable or indebted upon the cause of action set up in the petition. No material allegation of fact in the petition is controverted by the answer, but the liability and indebtedness therein charged against the defendant are sought to be avoided on the ground that the plaintiff had already been compensated therefor under the agreement referred to. This is an affirmative defence, which, if not controverted by reply, should be taken as true, and either so admitted or established by proof would constitute a complete bar to the action. The effect of the reply denying the allegations of the answer, therefore, was to put the defendant upon proof of the agreement alleged; and as no evidence was given on the trial of the action, but the case was submitted upon the pleadings, the answer availed the defendant nothing, leaving the petition of the plaintiff uncontroverted. Practically, therefore, the case was submitted to the court as upon default or demurrer to the petition.

Adopting this view of the pleadings, the plaintiff in error, contends that judgment should not have been rendered against it upon the case made in the petition: error.

1. Because it appears that the Baltimore & Ohio R. Co. was not the owner of the railroad crossed by the Cleveland, Mt. Vernon & Delaware R., but was a lessee thereof only.

2. It does not appear that the defendant either requested the plaintiff, or the company of whose road he is receiver, to incur the expenditure, or promised to pay its proportion of such expense.

It is conceded by the plaintiff that his right to maintain the action depends largely, if not solely, upon Rev. Stat. § 3333, and the construction to be given to it. It reads as follows:

“§ 3333. When the tracks of two railroads cross each other or in any way connect at a common grade, the crossing shall be made and kept in repair, and a watchman maintained thereat, at the joint expense of the companies owning the track. All trains or engines passing over such track shall come to a full stop not nearer than 200 feet nor farther than 800 feet from the crossing, and shall not cross until signalled so to do by the watchman, nor until the way is clear; and when two passenger or freight trains approach the crossing at the same time, the train on the road first built shall have precedence if the tracks are both main tracks over which all passengers and freights on the roads are transported; but if only one track is such main track and the other is a side or depot track, the train on the main track shall take precedence; and if one of the trains is a passenger train and the other a freight train, the former shall take precedence. And regular trains on time shall take precedence over trains of the same grade not on time; and engines with cars attached, not on time, shall take precedence of engines without cars attached, not on time.”

In the argument it is contended the ownership of the Cleveland, Mt. Vernon & Delaware R. is not properly stated in the petition. But this sufficiently appears; for it avers that the corporation was created and organized under that name, and that it built the road and operated it until the receiver was appointed in 1880. This point is not much relied on by the counsel for plaintiff in error.

The real contention is that the statute applies only to railroad companies owning the tracks which cross each other or connect at common grade, and companies operating roads are not owners or lessees.

The terms “owner” and “owning” depend somewhat for

their signification upon the connection in which they are used. To own is defined "to hold as property; to have a legal or rightful title to; to have, to possess;" and an owner is "one who owns; a rightful proprietor." Meaning of terms "owner" and "owning." An owner is not necessarily one owning the fee simple, or one having in the property the highest estate it will admit of. One having a lesser estate may be an owner; and indeed there may be different estates in the same property, vested in different persons, and each be an owner thereof. In the construction of statutes, to ascertain the proper meaning of such terms, regard must be had to their various provisions, and such effect given as these provisions clearly indicate they were intended to have, and as will render the statute operative. Thus, under the Mechanics' Lien Statute of March 11, 1843 (41 Ohio Laws, 66), which provided "that any person who shall perform labor or furnish material for constructing or repairing any building by virtue of a contract or agreement with the owner, shall have a lien upon such building, and the lot of land upon which the same shall stand," it was held that the word "owner" is not limited in its meaning to an owner of the fee, but includes also an owner of a leasehold estate. *Choteau v. Thompson*, 2 Ohio St. 114; *Dutro v. Wilson*, 4 Ohio St. 102.

In *Gilligan v. Providence*, 11 R. I. 258, it is held that "A tenant for life or years, or from year to year, is an owner," within the provisions of the statute which, gave "compensation to abutting owners for damages caused by a change of grade in highways." And under a statute which provides that "When any passenger shall die from any injury resulting from or occasioned by any defect or deficiency in any railroad or part thereof, or in any locomotive or car, the corporation which owns such railroad, locomotive, or car at the time such injury is received, resulting from or occasioned by any defect or deficiency above declared, shall forfeit and pay, for every passenger so dying, the sum of \$5000," the supreme court of Missouri held that the word "owner" in the act did not mean "the absolute owner, in whom the absolute right of property is vested," but means "the owner for the time being—the corporation for the time being operating, controlling, and managing the road, locomotive, or car."

The provisions of § 3333, as well as those of the next two sections, were intended to prevent collisions of trains, and injuries and similar calamities, at railroad crossings, often destructive of human life, besides inflicting heavy losses on companies operating the road; and they are well calculated for that purpose. They properly require all trains and engines passing on the tracks of either road to come to a full stop before crossing, and not to cross until signalled by the Object of statute.

watchman, and fix the order of precedence among trains and engines at the crossings. The managing agent and superintendent are required to publish to the employees such rules and regulations as shall secure strict compliance with the provisions of the statute; and engineers and others, in charge of engines, who fail to bring them to a stop, or cross before being signalled to do so by the watchman, are subject to penalties; and they, as well as the companies employing them, are made liable for the damages resulting from such neglect.

These or some such regulations are indispensable to the actual operation of the roads. They are necessary for the safety of passengers and property transported over those roads, and none the less so to their convenient and successful management by the companies engaged in operating them, and to the protection of their property and employees. The services of the watchman consist in giving the proper signals to approaching trains and engines; and to enable him adequately to perform this, since it becomes necessary to build and maintain the watchman's house, his services pertain wholly to the actual operation of the road, and result entirely to the benefit of the companies operating them.

The necessity for keeping the crossings in repair, and maintaining watchmen thereat, grows out of the use and operation of railroads whose tracks cross each other at a common grade. And lessee companies having the possession and control of the roads, and operating them as such, receive all the advantages and security resulting from safe crossing, and the services of the watchman, as fully in all respects as companies that are the absolute owners thereof could if they were operating them; and it would appear but reasonable that, while operating the road, they should receive the benefit subject to the burden of their expense as provided by the statute; and we are of the opinion that such lessees are companies "owning the tracks" of the roads operated by them, in the sense in which that phrase is used in the statute.

It is further contended that the petition fails to state a right of action against the defendant, because it does not show the defendant requested the expenditure for a portion of which it was sued, or that it promised to pay any part of it. The statute, it is claimed, does not authorize one company to make all the expenditure rendered necessary to comply with its provisions, and hold the other for half or any part of same. And there being no express agreement alleged nor any request from the defendant, or subsequent promise or ratification by it, from which one might be implied by law, the case, it is urged, falls within that class of voluntary outlay of money which gives no right of action.

Lessees are
companies
owning track.

Request for
expenditure—
Promise to pay.

Generally, where one person voluntarily pays money for another under such circumstances that the other is not at liberty to accept or reject the advantage of it, but is obliged to accept it, his acceptance of what he was not at liberty to reject is no evidence of ratification or adoption and raises no implicit promise to pay. Voluntary payment of money—Contribution. This rule has been applied to tenants in common where repairs or improvement of the common property has been made by one tenant without the consent of the other; and it is insisted the railroads in question were tenants in common, and to be governed by that rule. In the cases where the rule stated is enforced, it will be found that it was entirely optional with the tenant making the expenditure whether he would incur it or not. He might or not, as he chose. There was no duty resting upon him to do so, either by contract or arising from his relation to the co-tenant. In other words, the expenditure was purely voluntary, and thus lies at the foundation of the rule. But we apprehend the rule is inapplicable to a case like this, where two are under a joint duty or obligation to expend money, and one, in the performance of the common duty, discharges the whole obligation. It cannot in such case be said the payment is wholly voluntary. The rule is as well established as the one already referred to—that, where two or more are under a joint obligation, and one discharges the whole, he shall have contributions from the others. Usually this obligation is created by contract; but it can make no difference in principle whether it be by contract or operation of law, so long as the obligation is joint and not unlawful.

“The doctrine of contribution rests upon the broad principle of justice that, where one has discharged a debt or obligation which others were equally bound with him to discharge, and thus removed a common burden, the others who have received a benefit ought in conscience to refund to him a ratable proportion. It depends rather upon principles of equity than upon contract. From the equitable obligation, the law implies a contract, since all who have become jointly liable may reasonably be considered as mutually contracting among themselves, with reference to the duty, in conscience.” 2 Wait Act. and Def. p. 288, and cases cited.

In Bishop on Contracts, § 238, it is said: “When a duty is cast upon one by statute, or by equity and good conscience (the standard whereof is to be found in the books of law rather than those on moral science), or in any way by the law, whether statutory or common; or where one has been benefited by another who was discharging such duty,—the law creates a promise from him to do the thing or pay the benefit.” And again, in § 205, the same author says: “The law, by placing its com-

mand, in whatever form, upon one to do a thing for the benefit of another or the state, creates the promise from the latter to do it; as, for example, in the words of Blackstone: 'Whatever the laws order anyone to pay, that becomes instantly a debt, which he had before contracted to discharge.' Thus, when a statute imposes upon one a duty, the law creates a promise from him to the party benefited thereby to perform it." The application is obvious. A joint duty is by statute imposed, upon railroad companies whose roads cross at grades, to keep such crossings in repair, and maintain watchmen thereat, at their joint expense. The obligation is equally binding upon both companies, and neither can with impunity omit the performance of the duty or ignore the obligation. When, therefore, one performs the whole duty, and discharges the entire obligation resting upon both, it can with no propriety be said to be a mere voluntary act. One purpose of the statute undoubtedly was to promote the safety of people who travel over the roads, and the security of the property carried over them; and in this respect the duty of the companies under it is to the state and its citizens. But while this may have been the principal object of the statute, it also fixes the legal rights of the companies as between themselves, and imposes duties upon each to the other. These rights and duties pertain to the use of the common crossing; and among the duties, both to the state and toward each other, are those of keeping the crossing in repair and maintaining watchmen at their joint expense. Either may therefore lawfully do whatever is necessary to their performance. Applying the principle stated by Bishop on Contract, cited *supra*, the law's command created the joint promise of the companies to the state, and the several promise of each to the other, to perform the duties prescribed by the statute. In this sense the obligation of the companies becomes one of contract; and one of them having discharged the whole obligation, and the other no part of it though receiving the full benefit, there is no reason why he should not, upon the principle already stated, be entitled to reimbursement from the latter for its share of the common burden borne by the former.

The case of *Middleborough v. Taunton*, 2 Cush. 406, relied on by counsel for plaintiff in error, is not inconsistent with this conclusion, but, as we understand the case, is in harmony with it. In that case it appeared that the town of Middleborough was indicted for neglecting to repair one of its highways. It confessed the indictment, and was fined. The court appropriated the fine to the repair of the highway, and appointed an agent to superintend its application. The plaintiff alleged that the highway was upon the dividing line between it and the town of Taunton, and the duty of repairing the

*Middleborough
v. Taunton,*

same was equally incumbent on both towns. The dispute in the case was whether there was a common obligation on both towns to repair the highway. The defendant contended the whole of it was within the town of Middleborough, or, if not, the center of the highway was the dividing line, and each town was bound to keep in repair such highways only as were within their respective limits. The trial court ruled that the whole of the way was within Middleborough, and the plaintiff became nonsuit, subject to the opinion of the whole court. It does not appear to have been questioned that, if to both towns belonged the joint or common duty to repair the highway, the plaintiff should have recovered. But since that was not the case, the judgment was affirmed. Shaw, C.J., in the opinion, says: "But it is said that towns are by law (Rev. Stat. chap. 25, § 1) obliged to repair highways; and it is certainly true that all highways within the bounds of any town are to be kept in repair at the expense of such town. If towns repair beyond their bounds, without an actual request, it is a voluntary act done in performance of no obligation or duty; and money laid out for such a purpose is not expended at the implied request of the town, subject to the duty of such repairs. . . . It seems to us, therefore, that the case of the plaintiff falls within this dilemma. If the road was wholly in Middleborough, the plaintiffs have merely performed their own duty and paid their own debt. If one half of it only was in Middleborough, the other was in another town and county, and the plaintiffs, if they laid out money to repair it, have done so in pursuance of no actual request, or of any common duty or obligation constituting a request in law; and, of course, that an action for money paid will not lie."

It would seem to follow, from the reasoning of the learned chief justice, that if money had been expended in the discharge of a common obligation belonging to both towns to repair the way, the action would have lain.

The further claim is made by the plaintiff in error that, while the statute provides that the expense of keeping the crossing in repair and maintaining watchmen shall be borne by the companies jointly, it is silent in regard to the proportion to be borne by each; and as one company may require the watchman's services many times more than the other, the expenses should be apportioned accordingly. Whether in such case the expenses should be apportioned on the basis indicated, or, upon any state of facts, an unequal division could, under the statute, be made, we need not decide. Such circumstances of inequality of benefits are not shown, nor does any other reason appear, making an equal division of the burden

Silence of
statute as to
proportioning
expense.

unjust. If any such existed, the defendant should have made it to appear.

The correct rule on this subject is clearly stated in Bishop on Contracts, § 216, as follows: "When persons are under equal obligations to do a thing, not violative of law, and one of them does it, if there is no circumstance rendering the equities between them otherwise than equal, and no express agreement, the doer is entitled, under a promise which the law creates, to recover such sums of his several companions as shall leave the burdens equal. This is the familiar rule between sureties and other joint promisors, where one has discharged more than his proportion of the debt; and it applies also in other like cases."

We think the right of the plaintiff to recover upon the case made in his petition is sustained by sound reason, and sanctioned by authority, and the judgment recovered by him should be affirmed.

Judgment affirmed.

Railroad Crossings—Watchmen.—For a full discussion of the subject of the duty of railroad companies to construct and keep in repair suitable crossings, and their obligation to maintain flagmen thereat, see tit. "Crossings," 4 Am. & Eng. Encyc. of L. 906-951.

STATE *ex rel.* LEESE, Atty.-Gen.

v.

CHICAGO, B. AND Q. R. CO.

(*Nebraska Supreme Court, December 13, 1888.*)

Eminent Domain—Foreign Corporations.—While section 8 of article 11 of the constitution of this state provides that no railroad corporation organized under the laws of another state, or of the United States, and doing business in this state, shall be entitled to exercise the right of eminent domain, or have power to acquire the right of way, or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this state, it does not prohibit existing railroad companies, one of which is a domestic corporation, from becoming a body corporate by consolidation, instead of by the formation of a new corporation, providing such consolidation is made pursuant to the laws of this state permitting the same, and by which it became "a body corporate pursuant to and in accordance with the laws of this state."

Same—Foreign and Domestic Corporation—Consolidation—Effect.—The C., B. & Q. R. Co. was a corporation organized under the laws of the state of Illinois and of the state of Iowa, and operating a railroad from the city of Chicago, in Illinois, to a point on the Missouri river, in Iowa, opposite the city of Plattsmouth, in Nebraska and the B. & M. R. R. Co. in Nebraska was a corporation organized under and by virtue of the laws of that

state, operating a railroad from the city of Plattsburgh to Kearney. These two corporations consolidated their stock and franchises into one corporation or joint-stock company, to be known as the "C., B. & Q. R. Co.," under the provisions of section 114, c. 16, Comp. St. 1887. It was held that by virtue of such consolidation, and the compliance with the laws of this state, the corporation created thereby became a body corporate, pursuant to and in accordance with the laws of this state, and was therefore not a foreign corporation.

Quo warranto. Information instituted by William Leese, attorney-general, against the Chicago, Burlington & Quincy R. Co. alleging that defendant is unlawfully usurping the rights, privileges, and franchises of a domestic corporation.

The Attorney-General and J. M. Stewart for plaintiff.

Dexter, Herrick & Allen and Marquett & Deweese for defendant.

REESE, C. J.—This is an information in the nature of a *quo warranto*, instituted by the attorney-general against the defendant. The allegations of the information are, in substance, that the defendant is a railroad corporation organized and existing under the laws of the state of Illinois, and is not incorporated under the laws of this state, and is therefore a foreign corporation; that it has been, and is now, unlawfully exercising the right of eminent domain, by purchasing real estate for depot and other uses, as well as by obtaining the same by condemnation proceedings, for the purposes of right of way for its railroad, and that it is now, and has been for some time past, unlawfully usurping the rights, privileges, and franchises of a domestic corporation, without having become one under the laws of this state. Facts.

To this information the defendant filed its answer, which consists of an extended history of the defendant, from the time of its incorporation in the state of Illinois to the present time, and which need not be noticed further than that the Chicago, Burlington & Quincy R. Co., as originally organized, constructed its railroad from the city of Chicago to the city of Burlington, Iowa; that the Burlington & Missouri River R. Co. was duly incorporated under the laws of the state of Iowa, and that it constructed a line of road from said city of Burlington to a point on the Missouri river, opposite the city of Plattsburgh, in this state; that the lines of road were so constructed as to form a continuous line, and were connected for that purpose at the city of Burlington; that these two corporations, acting under the laws of the state of Illinois and of the state of Iowa, consolidated their franchises and interests so as to become one corporation or joint stock company by the name of the "Chicago, Burlington & Quincy R. Co.;" that in the year 1869 articles of incorporation

were filed in the office of the secretary of state of Nebraska, duly incorporating the Burlington & Missouri River R. Co. in Nebraska, the object and purpose of which, as set forth in its articles of incorporation, was to construct and operate a line of road of uniform gauge with the other railroads from Plattsmouth to Kearney; that said company constructed its railroad in accordance with the purpose of its incorporation, and by which a continuous line of traffic could be maintained from the city of Kearney to the city of Chicago. The only other feature of the answer which it is deemed necessary to notice is that on and prior to the 1st day of January, 1880, the railroad of the Chicago, Burlington & Quincy R. Co. in Iowa, and the railroad of the Burlington & Missouri River R. Co. in Nebraska, being connected at the boundary line between the states of Iowa and Nebraska, at the city of Plattsmouth, in accordance with the laws of the state of Iowa and Nebraska, and in pursuance of a vote more than three fourths of all the stockholders of the respective companies, entered into certain articles of consolidation, whereby the parties thereto merged and consolidated the stock of the respective companies, making one joint stock company of said corporations by the name of the Chicago, Burlington & Quincy R. Co.; that, by force of said articles of consolidation and the laws of Nebraska, the said Chicago, Burlington & Quincy R. Co., when organized, became a corporation of Nebraska, pursuant to and in accordance with the laws of the state, and, by virtue of such consolidation and compliance with the laws of this state, became a domestic corporation, with all the rights, franchises, and privileges of any other domestic corporation, including the power to exercise the right of eminent domain. It therefore denies that it is unlawfully usurping any of the rights which it is now exercising, but insists that by the consolidation referred to, the method of which is set out at length in the answer, it became and is a domestic corporation, and is not a foreign corporation, as alleged in the information.

It is not deemed necessary to set out in detail the method of consolidation which is presented and set up in the answer, further than to say that it appears to have been in compliance with the requirements of the laws of this state, and especially of section 114, c. 16, Comp. St. 1887. This section we here copy: "Every railroad company organized under the laws of this state shall have power to intersect, join, and unite its railroad or railroads with any railroad or railroads constructed, or to be constructed, in this state, or in any adjoining state or territory, by any railroad company organized under the laws of any state or territory, at such point on the boundary line of this state and such adjoining state or territory, or at such other point as may be mutually agreed upon

Method of con-
solidation—
Statute.

between said companies; and all such railroad companies whose railroads are or may be connected at the boundary line of this state, or at such other agreed point, by bridge, transfer, ferry, or otherwise, as to form practically a continuous line of railway over which cars may pass, are authorized to consolidate the stock of the respective companies, making one joint stock company thereof, and bring the railroads thus connected under one management, upon such terms as may be mutually agreed: provided, no railroad company shall consolidate its stock, property, franchises, or earnings, in whole or in part, with any other railroad corporation owning or operating a parallel or competing line in this state. Articles stating the terms of such consolidation shall be approved by each company by a vote of the stockholders owning a majority of the stock, in person or by proxy, at either a regular annual meeting thereof, or at a special meeting called for that purpose, by a notice of at least sixty days, stating the object of such meeting, to be addressed to each of such stockholders when their place of residence is known, and deposited in the post office, and published for at least three successive weeks in one newspaper in at least one of the cities or towns in which each of said corporations has its principal business office, or by the consent, in writing, of such majority annexed to such articles, and copies of said articles and of the records of such approval or of such consent, and accompanied by lists of the stockholders of such corporation, and the number of shares held by each, duly certified by the respective presidents and secretaries, with the respective corporate seals affixed, shall be filed for record in the office of the secretary of state of this state before any such consolidation shall have any validity or effect. Upon filing for record in the office of the secretary of state of the copies of said articles of such consolidation, and of such record of approval or consent, the companies so consolidating shall become one corporation, and the said consolidating corporations shall become merged in the new corporation provided for in said articles, and shall be known thereafter by the corporate name therein adopted, and shall within this state possess all the powers, franchises, and immunities, including the right of further consolidation with other corporations under this section, and be subject to the same liabilities and restrictions imposed by the laws of this state upon other railroad companies, and shall, in addition, possess such powers, franchises, and immunities, and be liable to such special restrictions and liabilities as the said consolidated corporations were within this state possessed of or subject to under any laws of this state peculiarly applicable to them, or either of them, at the time of such consolidation."

Upon the filing of this answer the cause was argued and submitted upon the pleadings; counsel for defendant insisting that,

by virtue of the consolidation set out in the answer, which was admitted by the attorney general, the defendant became a domestic corporation. The attorney general contended against this conclusion. The case is decided upon the pleadings alone.

The question presented is not whether defendant has complied with the laws of this state. If that is admitted, the question still is whether or not such compliance has rendered it a domestic corporation within section 8 of article 11 of the constitution, which provides that "no railroad corporation organized under the laws of another state, or of the United States, and doing business in this state, shall be entitled to exercise the right of eminent domain, or have the power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate, pursuant to and in accordance with the laws in this state." It will be noticed that by section 114, above quoted, it is provided that, upon the filing for record, in the office of the secretary of state, of copies of the articles of consolidation, with the consent or approval of the companies so consolidating, they shall become one corporation, which shall be known by the name adopted, and shall possess the powers, franchises, and immunities, and be subject to the liabilities and restrictions, imposed by the laws of this state upon other railroad companies, and as the consolidating corporations, within this state were possessed of, subject to and under the laws of this state at the time of such consolidation. This section, in effect, provides that where a domestic corporation—that is, one organized under the laws of this state, and having its existence solely within this state—becomes consolidated with a corporation originally created in another state, that the new corporation is entitled to exercise the same rights, and is subject to the same restrictions and liabilities, as the original corporation in this state before the consolidation. These rights and privileges consist in the exercise of the right of eminent domain, of acquiring property by purchase for the use of the corporation, and of enjoying such other rights and privileges as properly belong to corporations. The restrictions and liabilities are that it shall be subject to the laws of this state, and its jurisdiction, in the execution of their authority; that it shall not have the peculiar privileges which are granted to foreign persons or corporations, in the way of removal of its suits from the state to the federal courts; and that, in the exercise of all its corporate functions, it must be governed by and be subject to the laws of this state. It was evidently the purpose of the legislature, in the enactment of the law under consideration, that by complying with its provisions the corporation so complying should be a domestic and not a foreign corporation. This being

Question pre-
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Rights which
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true, it seems to us quite clear that such a consolidation, when effected, would bring the consolidated company, not only within the spirit, but within the letter, of the law and of the constitution. 2 Mor. Priv. Corp. § 939 et seq. By the section of the law above quoted, such a consolidated corporation would not be a corporation "organized under the laws of another state, or of the United States;" and while not originally incorporated within this state, in the manner in which new corporations are formed, yet "it would become a body corporate pursuant to, and in accordance with, the laws of this state," as specified in the constitution, although, in a legal sense, distinct from the corporation in the other states through which the road runs; in fact, a domestic corporation. The legislature, therefore, by the act provided a method, other than that of forming a new corporation, by which corporations in existence, one of which is a domestic corporation, might become such body corporate under the laws of the state. It is alleged in the answer that this consolidated corporation was created about the 1st day of January, 1880; that since that date it has been, in law and in fact, a domestic corporation, and not a corporation "organized under the laws of another state, or of the United States."

Upon an examination of the allegations and averments of the answer, in connection with the section of the statute above referred to, as well as that of the constitution, we are convinced that by the action of the companies, as set out in the answer, the defendant became, and and now is, a "body corporate, pursuant to and in accordance with the laws of this state," and is entitled to exercise the rights and privileges of such corporation, and is subject also to all the limitations and liabilities imposed upon domestic corporations, and that it is not a "corporation organized and existing under the laws of the state of Illinois," as alleged in the information, nor of any other foreign state. It was stated by counsel for the defendant, upon the argument of the cause, that the view entertained by them at that time had not been entertained by them during the whole of the time which has elapsed since the 1st day of January, 1880; and that, acting upon a different opinion, they had sought to and had removed causes from the courts of this state to the United States circuit court as a foreign corporation, but that in the early part of the year 1888 they had become convinced that they were not entitled to do so, and since that time had acted in all respects as a domestic corporation subject to the laws of this state. The attorney general, being desirous only of having the *status* of the defendant company ascertained and declared, agreed with counsel representing it upon a judgment to be entered in case the court found, upon the facts presented, that the defendant was not unlawfully usurping the

Defendant not
a foreign cor-
poration.

rights, privileges, and franchises as alleged in the information. Judgment will therefore be entered in accordance with this opinion. The other judges concur.

Eminent Domain—Exercise of Power of—Foreign Corporations.—It is no objection to the exercise of the power of eminent domain by a railroad company that it is chartered under the laws of another state. See *Gray v. St. Louis & S. F. R. Co.*, 81 Mo. 126; *Matter of Townsend*, 39 N. Y. 171; *Morris Canal & Banking Co.*, 24 Barb. (N. Y.) 658; *Compare Holbert v. St. Louis, etc., R. Co.*, 45 Iowa 23, and see generally *Abbott v. New York, etc., R. Co.*, 33 Am. & Eng. R. R. Cas. 146, note 155.

Same—Procedure Corporations—Validity of Incorporation.—The court cannot in condemnation proceedings by a *de facto* corporation inquire whether or not the petitioner is a *de jure* corporation; this question can only be determined on *quo warranto* for that purpose. *Brown v. Camulet R. Co.* (Ill.) 18 N. E. Rep. 283. Thus in the absence of any such proceedings a *de facto* railroad corporation may exercise the right of eminent domain, notwithstanding any objection by the land owner. See *McAuley v. Columbus, etc., R. Co.*, 83 Ill. 348; *Reisner v. Strong*, 24 Kan. 410; s. c., 10 Am. & Eng. R. R. Cas. 335.

Same—Consolidation of Roads.—A consolidation of railways which constitutes the consolidated railroad company, the successor to the rights and purposes of the companies consolidate vests in the consolidated company the power to institute proceedings for the condemnation of lands. *North Caroline R. Co. v. Carolina Cent. R. Co.*, 83 N. C. 489.

STATE *ex rel.* NEW HAVEN AND DERBY R. CO.

v.

RAILROAD COMMISSIONERS.

(*Connecticut Supreme Court of Errors, July 20, 1888.*)

Eminent Domain—Railroads—Change of Road—Depot.—Section 3461, Gen. St. Conn., authorizes a railroad company in altering the line of its road, to take a street for depot purposes, subject to the approval of the railroad commissioners.

Same—Railroad Commissioners—Duty of.—It is the duty of the railroad commissioners to approve or disapprove of the location of a new site for a depot.

CASE reserved from Superior Court, New Haven County.

Application by the New Haven & Derby R. Co. for *mandamus* to compel the railroad commissioners to act upon the location of a new passenger station and freight depot in the city of New Haven. Facts stated in opinion.

S. E. Baldwin for relator.

G. M. Woodruff for defendants.

CARPENTER, J.—In December, 1887, the New Haven & Derby R. Co. was using its railroad in such a manner as to cross Meadow street, in the city of New Haven, with three of its tracks at grade. Across that street a large amount of switching was done. In 1886, by special act of the legislature (Sp. Laws, 385), the company was required, either voluntarily or upon proceedings instituted by the railroad commissioners, to take such action as to lessen the switching across the street. With that end in view, the company, in December last, decided to abandon its passenger station and freight depot on Meadow street, and relocate them at a point considerably west of Meadow street, namely, west of Commerce street, and south of Silver street. The site thus selected was crossed at grade by three other streets. The company decided to extend Silver street so as to accommodate the public travel, and to discontinue so much of the three other streets as interfered with the location selected. This location was modified so as to reserve to the city the right to maintain its sewers, and to require the company, at its own expense, to construct and maintain a bridge, for foot-passengers only, over the site along one of the streets. On January 18, 1888, the railroad commissioners duly approved of the abandonment of the depots at Meadow street, and on the 23d day of May following they approved of the new site selected, except so far as the location involved the discontinuance of the streets; and in respect to that matter the finding and order are as follows: "As to the discontinuance and change of Hill, La Fayette, and Liberty streets, asked for in said petition, we are of the opinion that, if the premises above described are to be condemned and used for the purposes designated in said petition, it will be unsafe to use the said streets as they now exist at grade; still we think that under this proceeding we have no authority to order the discontinuance and changes asked for in the petition, and therefore decline so to do." This suit is an application for a *mandamus* to require the commissioners to act upon the matter of the discontinuance of the streets. The defendants admit all allegations of matters of fact to be true, but deny that they have by law jurisdiction to proceed and render judgment in the matter. The case is reserved for the advice of this court.

The question seems to be this: Can the railroad company take the land used for streets for depots or depot grounds? If it can, it will be conceded that the commissioners have jurisdiction to approve or disapprove of such taking, and that it is their duty to do so. The company was chartered in 1864, with such powers as were granted to railroad companies by the public act of 1849. That act, as found in the present revision in section 3460, authorizes

Facts.

Question presented—Statutory provisions.

the company to lay out its road, not exceeding six rods wide : and for the purpose of cuttings, embankments, and procuring stone and gravel, and for necessary turnouts, to take as much more real estate as may be necessary. Section 3476 relates specifically to the matter of highways, and is as follows : " When it shall be necessary for the construction of a railroad to intersect or cross any water-course not navigable, or any public highway, the railroad company may construct said railroad across or upon the same if the railroad commissioners shall judge it necessary ; but said company shall restore said water-course or highway thus intersected to its former state, or in a sufficient manner not to impair its usefulness ; and in case any highway is so located that said railroad cannot be judiciously constructed across or upon the same without interfering therewith, said company may, with the consent of said commissioners, cause said highway to be changed or altered, so that said railroad may be made on the best site for that purpose ; but said company shall put such highway in as good situation and repair as it was previous to such alteration under the direction of said commissioners, whose determination thereon shall be final."

Power to take
street for depot.

The defendants contend that this section, even in locating the road originally, does not authorize the company to take the streets for depot buildings. That depends upon what is meant by a "railroad."

What is it? Is it simply the tracks from one terminus to another? Or does it embrace cuttings, embankments, side tracks, and depot buildings? Depots for passengers and freight are essential parts of railroads. A railroad is incomplete without them. It is doubtless true that in speaking of the several parts of a railroad we distinguish between the main tracks, side tracks, or turnouts, and depots ; but, when we speak of a railroad from one place to another, we use the word in a comprehensive sense, as embracing all these, and mean by it, so far as real estate is concerned, all the land and buildings owned by the corporation, and necessary or convenient for the transaction of its business. It seems to us, therefore, that a reasonable construction of the statute would authorize the company, with the consent of the commissioners, to take streets for depots as well as for its tracks, if this was a proceeding in the original location and construction of the road.

But this is a proceeding designed to effect some changes and improvements in the terminal facilities of an existing railroad, and may properly be regarded as an alteration of the line of a road which has been "located, approved, and established." The statute specially applicable to such a case is section 3461, and is as follows : " Every railroad company, after its line of road shall have been

Changing location—Duty of commissioners.

located, approved, and established, may so far alter the location of such road as to change the radius of its curves, straighten and improve its lines, width, and extent of depot grounds, slopes, and embankments, and extend its lines of sight, when such changes are approved by the railroad commissioners, and may take lands for additional tracks, turnouts, and freight and passenger stations and depots; also for the purpose of supplying water for the use of its engines and stations," etc. In behalf of the railroad company it is contended that this section authorizes the taking of portions of these streets for the purposes mentioned. The defendants deny this, and claim that it relates solely to the taking of land by condemnation, and does not in terms authorize the taking or using of public streets for any of purposes named. It is true this section does not use the word "street," or "highway," but the word "lands" is comprehensive, and may include everything that may be classed as real estate. A highway or street is a public easement in land. It attaches to it, and cannot exist separated from it; so that it is in fact a part of the realty. When the statute authorizes the taking of land, unless there is something indicating a contrary intent, it authorizes the taking of all the incidents and appurtenances of land. All buildings and other improvements, all rights and privileges issuing out of land, whether private or public, may be taken, always provided due compensation shall be made to parties injured. When the statute uses the word "land" in granting to a railroad company the power to exercise the right of eminent domain, it will be presumed to use it in its comprehensive sense, as including all interests attached to it or growing out of it; especially is this so if otherwise the rights granted would be inadequate or incomplete. Streets and highways can form no exception to this rule, because other statutes *in pari materia* expressly and by necessary implication confer the power to take and use portions of highways for railroad purposes, substituting other highways, if need be, for those thus used, ample provision being made for protecting the rights of the public through the action of the railroad commissioners. Those statutes afford ample proof that the legislature intended, not only that the tracks of the railroad might be laid on the best site for the benefit of the company, but also that depots should be placed in the best locations for the benefit of the public, and that neither of these intentions should be defeated by the existence of highways. Both intentions are designed to promote the public welfare; the latter especially and more directly. Depots are frequently, if not generally, located in thickly-settled portions of cities, towns, and villages. In giving them the best locations, it must sometimes happen that portions of streets will be so interfered with that discontinuance becomes necessary.

It is in the interests of the public that those whose duty it is to locate them should have power to select the best locations. In conclusion, we think the company has the power, subject to the approval of the commissioners, to take the premises in question for the purposes named, and that the defendants have jurisdiction, and that it is their duty to approve or disapprove of the location, as the needs of the public may require. The other judges concurred.

Eminent Domain--Streets and Highways--Condemnation.—A street or public highway may be appropriated for the purpose of laying a railroad track, and such appropriation is not a perversion from its original purpose so long as such use does not interfere with the use of it by the public as a highway for passage and repassage. *Milburn v. Cedar Rapids*, 12 Iowa, 246; *Lexington & O. R. Co. v. Applegate*, 8 Dana (Ky.), 289; s. c., 33 Am. Dec. 497; *Porter v. Northern Mo. R. Co.*, 33 Mo. 128; *Chapman v. Albany & S. R. Co.*, 10 Barb. (N. Y.) 360; *Plant v. Long Island R. Co.*, 10 Barb. (N. Y.) 26. The legislature is vested with power to authorize such an appropriation (see *Perry v. New Orleans M. & C. R. Co.*, 55 Ala. 413; s. c., 28 Am. Rep. 740; *Savannah & T. R. Co. v. Savannah*, 45 Ga. 602; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25; *Indianapolis & C. R. Co. v. State*, 37 Ind. 489; *Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa, 338; s. c., 24 Am. Rep. 773; *Ingram v. C. D. & M. R. Co.*, 38 Iowa, 669; *Clinton City v. Cedar Rapids & M. R. Co.*, 24 Iowa, 445; *Hughes v. Mississippi & M. R. Co.*, 12 Iowa, 261; *Tate v. Missouri, Kansas City & T. R. Co.*, 64 Mo. 149; *State v. Hoboken*, 35 N. J. L. (6 Vr.) 205; *Carpenter v. Oswego & S. R. Co.*, 24 N. Y. 655; *Davis v. Mayor of N. Y.*, 605; s. c., 67 Am. Dec. 189; *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339; s. c., 67 Am. Dec. 471; *Philadelphia v. Empire Passenger R. Co.*, 3 Brewst. (Pa.) 547; *Faust v. Passenger R. Co.*, 3 Phila. (Pa.) 164; *In re Philadelphia & T. R. Co.*, 2 Whart. (Pa.) 25; *District of Columbia v. Baltimore & P. R. Co.*, 114 U. S. 453; bk. 29, L. ed. 216; s. c., 20 Am. & Eng. R. R. Cas. 28; *Jackson Co. Horse R. Co. v. Interstate Rapid Transit Co.*, 24 Fed. Rep. 306), and such power may be delegated to municipal authorities (*Atchison St. R. Co. v. Missouri Pac. R. Co.*, 31 Kan. 660; s. c., 14 Am. & Eng. R. R. Cas. 439; *Covington St. R. Co. v. Covington*, 9 Bush (Ky.), 127; *Donnaher v. State*, 16 Miss. (8 Smed. & M.) 640; *Milhan v. Sharp*, 27 N. Y. 611; s. c., 15 Barb. (N. Y.) 193; 17 Barb. (N. Y.) 435; 9 How. (N. Y.) Pr. 102; *Mercer v. Pittsburgh, Ft. W. & C. R. Co.*, 36 Pa. St. 99, *Re Philadelphia & T. R. Co.*, 6 Whart. (Pa.) 25). But such delegation can be made only by express legislative enactment. See *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413; s. c., 28 Am. Rep. 740; *Polack v. Trustees*, 48 Cal. 490; *State v. Hoboken*, 35 N. J. L. (6 Vr.) 205; *Davis v. Mayor of New York*, 14 N. Y. 506; s. c., 67 Am. Dec. 186; *Lawrence v. Williams*, 35 Ohio St. 168; *East Portland v. Multnomah Co.*, 6 Oreg. 162.

The right to construct a railroad in a street or public highway must be conferred by legislative grant (see *St. Louis V. & T. H. R. Co. v. Haller*, 82 Ill. 208; *State v. Davenport & St. P. R. Co.*, 47 Iowa, 507; *Chicago & N. S. W. R. Co. v. Newton*, 36 Iowa, 299; *Hine v. Keokuk & D. M. R. Co.*, 24 Iowa, 636; *Attorney-General v. Morris & E. R. Co.*, 19 N. J. Eq. (4 C. E. Gr.) 386, *Pennsylvania R. Co.'s Appeal*, 93 Pa. St. 150; s. c., 3 Am. & Eng. R. R. Cas. 507; *Cake v. Philadelphia & E. R. Co.*, 87 Pa. St. 307; *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325; *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339, *Houston & T. C. R. Co. v. Odum*,

53 Tex. 343; s. c., 2 Am. & Eng. R. R. Cas. 503), or by the express consent or grant of the municipal authorities to whom the power of control is delegated. See *Savannah & G. A. R. Co. v. Shiels*, 33 Ga. 601; *Wiggins v. East St. L. U. R. Co.*, 117 Ill. 450; *City of Quincy v. Chicago & E. R. Co.*, 75 Ill. 74; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439; *Cook v. Bloomington*, 36 Iowa, 357; s. c., 6 Am. Rep. 649; *Lexington & O. R. Co. v. Applegate*, 8 Dana (Ky.), 289; s. c., 33 Am. Dec. 497; *Wolfe v. Covington & L. R. Co.*, 15 B. Mon. (Ky.) 404; *Harrison v. New Orleans P. R. Co.*, 34 La. An. 462; *Hoverlman v. Kansas City Horse R. Co.*, 79 Mo. 632; s. c., 20 Am. & Eng. R. R. Cas. 17; *Patterson & P. H. R. Co. v. Patterson*, 24 N. J. Eq. (9 C. E. Gr.) 158; *Pacific R. Co. v. Leavenworth*, 1 Dill. C. C. 399; *Pembroke v. Canada C. R. Co.*, 3 Ont. (Can.) 503; s. c., 14 Am. & Eng. R. R. Cas. 107.

But under legislative or municipal authority to construct its track along a street a railroad company cannot monopolize such street to the exclusion of the public and private uses to which it has been appropriated. See *Tate v. Ohio & M. R. Co.*, 7 Ind. 479; *New Orleans & C. R. Co. v. Second Municipality of New Orleans*, 1 La. An. 128; *Lackland v. Northern Mo. R. Co.*, 31 Mo. 180; s. c., 34 Mo. 259; *Farrand v. Chicago & N. W. R. Co.*, 21 Wis. 435; *Janesville v. Milwaukee & M. R. Co.*, 7 Wis. 484. See also the cases first cited in this note.

In the appeal of *Philadelphia, N. & N. Y. R. Co. (Pa.)*, 13 Atl. Rep. 708, the defendant railroad company purchased a turnpike road, leading into the city of Philadelphia, for the purpose of constructing its railroad thereon, but continued to use it as a turnpike, and collected tolls. Subsequently proceedings were instituted under act Pa. June 2, 1887 (P. L. 306), to condemn a section of the turnpike road and open it to public travel. *Held*, that it was no objection to the proceedings that the company still intended to use the road for right of way; the only effect of the proceedings being to take away the turnpike privileges, and the company still having the right to appropriate the road when converted into a public highway, if necessary for its right of way.

For a full discussion of the subject of the condemnation of streets and highways and their appropriation for the purpose of railway tracks, see 6 Am. & Eng. Encyc. of L., tit. "Eminent Domain," v, 5, b., p. 534.

NEW JERSEY ZINC AND IRON CO.

v.

MORRIS CANAL AND BANKING CO. *et al.*

(*New Jersey Court of Chancery, Aug. 30, 1888.*)

Wharves—License—Conditions of.—A license under the wharf act of 1851 confers no right on the licensee, unless he is the owner of upland abutting on tidewater. His license is conditional, dependent on his having title to a *ripa* lying behind the public domain covered by his license.

Navigable Stream—Riparian Owner—Title.—A person acquiring land abutting on a navigable stream takes title only to the high-water line, and that line is limited by the outflow of the medium high tide between the spring and neap tides. All below that line belongs to the state. But in virtue of a local custom now having the force of established law, the adjacency of the land of such an owner to the stream invests him with a

license to fill in and dock out on the public domain in front of his land, to such an extent as does not interfere with public rights; and this license, when executed, becomes irrevocable.

Deed to Real Estate—Qualified Fee—Rights Under.—Under a deed granting only a qualified fee, the grantee has, while his estate continues, the same right to the exclusive possession and enjoyment of the land granted, and as complete dominion over it, for all purposes, as though he held it in fee simple absolute.

Eminent Domain—Acquisition Under—Fee.—Where the state invests a corporation with the prerogative of eminent domain, for the purpose of enabling them to construct and operate a public highway, and they take land by force of their charter for the purposes of such highway, the grant to them should be construed, not as investing them with capacity to take a fee, but as merely giving them power to acquire such an easement in the land taken as will enable them fully to accomplish the purposes for which they were created.

Same—Construction—Rules of.—Such grants, like all public grants, are to be strictly construed. What is not plainly given is to be understood as withheld.

Same—Easement—Fee in Owner.—In case where the Morris Canal & Banking Co. have, by force of their charter, and not by grant, taken land for a part of their right of way, they have simply acquired such an easement in the land as it was necessary for them to have to fully accomplish the purposes of their creation, leaving the fee in the owner of the land, with good right on his part to make any use of the land which will not prevent the canal company from having the full enjoyment of their easement.

Same—Riparian Owner—Connection with Tidewater—Right to Preserve or Improve.—The acquisition, by a railroad or canal company, of an easement, for a right of way over the land of a riparian owner, along or on the shore of his land, does not, according to general principles of law, deprive such owner of his right or equity to preserve or improve the connection of his land with the adjacent tidewater.

SUIT under statute of 1870 to settle title to lands. On final hearing on bill and answer and proofs.

The facts are stated in the opinion.

John R. Emery and Henry C. Pitney for complainant.

Oscar Keen and Robert Gilchrist for defendants.

VAN FLEET, V.C.—This suit is brought under the statute of 1870, authorizing this court in certain cases to settle and determine the title to lands. Rev. 1189. The jurisdiction of the court is undisputed. Both parties admit that the necessary facts to give jurisdiction exist, and each calls upon the court to pronounce a decree establishing the title it sets up. The case presents simply a question of title.

The subject of the suit is a tract of land situate in the city of Newark, lying on the south side of the Passaic river, extending northerly from the towpath of the Morris canal to the dock line of the river, and bounded on the east by lands of a corporation known as the Chemical Works, and on the west by lands of S. C. Williams.

Case stated—
Facts.

Its dimensions, as given in the complainant's bill, are as follows: being 1095 feet in length along the dock line, about 1170 feet in length along the towpath, about 178 feet along lands of the Chemical Works, and about 102 feet along lands of S. C. Williams. From this description it will be seen that the principal part of the land in controversy lies between the high and low water lines of the Passaic river. The complainant's immediate predecessors in title (The New Jersey Zinc Co.) in October, 1870, obtained a license, under the wharf act of '1851, from a joint commission appointed by the chosen freeholders of the counties of Essex and Hudson, authorizing them to fill in and dock out on the land in question; and they soon thereafter erected a line of piling, surmounted by a cap or string piece, along its front and western boundary. The land on the east, belonging to the Chemical Works, and forming the eastern boundary of the tract in dispute, had already been filled in, out to the dock line. The complainants and their predecessors in title, after obtaining the license and before the institution of this suit, expended, in improving the land in dispute, over \$17,000.

The license granted to the New Jersey Zinc Co. gave them no authority to fill in and dock out unless they were the owners of a *ripa* lying behind the land covered by tidewater. A license granted under the statute of 1851 confers no right whatever on the licensee unless he is the owner of the shore, and is of no use to him unless he is. His license is conditional, the condition being that he has title to a *ripa* lying behind the public domain covered by his license. *Brown v. Morris Canal & Banking Co.*, 3 Dutch. 648.

License under
wharf act.

Without title to a *ripa* it is entirely clear that the complainants are in no position to assert a right to any of the land in dispute lying beyond the high-water line. The law on this subject is so firmly settled as not to be open to debate in this court. All navigable waters within this state, together with the soil under them, belong in actual proprietorship to the state. A person acquiring title to land abutting on a navigable stream takes title only to the high-water line, and that line is limited by the outflow of the medium high tide between the spring and neap tides. All below that line belongs to the state, and the state may, at any time before it is reclaimed by the owner of the adjacent upland, grant it for a public use to whomsoever it sees fit. A grantee of lands abutting on a navigable stream acquires no peculiar rights, as incidents of his estate, in the land beyond the high-water line, lying in front of his land; but in virtue of a local custom long prevalent in this state, and now having the force of established law, the adjacency of his land to the stream invests him with a license to fill in and wharf out, on the public domain, to such

Navigable
stream—Land
beyond high-
water line.

an extent as does not interfere with the public rights of fishing and navigation; and this license, when executed, becomes irrevocable, and confers on the riparian owner a good and indefeasible title to the land thus reclaimed. *Gough v. Bell*, 2 Zab. 441; *Stevens v. Paterson & Newark R. Co.*, 5 Vroom, 532.

No such license exists, however, in favor of any person except a riparian owner. It is a right growing out of the adjacency of his land to navigable water, and is incident to the ownership of land thus located, but can have no existence apart from the ownership of land abutting on a navigable stream.

The complainants show a perfect paper title to the lands in dispute. They claim under the proprietors of the eastern division of New Jersey. Their title to the eastern part of the tract in question originated in a survey made to one of the proprietors in March, 1806, and to the western part under a survey made to another of the proprietors in August, 1833. The transmission of the title from these two proprietors to the complainants, through several intermediate conveyances, is fully established. The defendants do not deny that the complainants show a perfect paper title, but they say that all the lands covered by their title lay, at the time their title originated, below the high-water line of the Passaic, and therefore it was not possible for a title to be acquired by them except by a grant from the state, and that, inasmuch as no such grant is shown, the complainants show no title; in other words, that their paper title is worthless. This statement of the defense is, in a material respect, much broader than that made by the defendants' answer. It is a fact about which there is no dispute,—indeed, it is one of the few things about which no controversy was made during the hearing,—that the defendants' canal, along nearly the whole of the *locus in quo*, was constructed in part on lands covered by the complainant's title. The defendants' answer does not claim that that part of the land covered by the complainant's title upon which the defendants constructed their canal lay below the high-water line of the Passaic; on the contrary, it distinctly admits that it lay above the high-water line. The answer speaks, on this point, as follows: That the canal was so located along and opposite the piece of land in dispute as that it skirted the high-water line of the Passaic in such manner that, when it was constructed, the base of the bank which supported the towpath of the canal extended to the high-water mark of the river, along the whole length of the strip of land now in dispute in this cause. This averment, as I understand it, asserts with the utmost perspicuity that, on the completion of the canal, the base or foot of the towpath was coincident with the high-water line along the whole of the *locus in quo*. It follows necessarily that all of the land

covered by the complainant's title, which the canal and towpath occupied, lay above high-water line.

Accepting the statement of the answer on this subject as an accurate description of the location of that part of the land covered by the complainant's title, which the canal occupied, there can be no doubt that their title at one time embraced a sufficient *ripa* to confer upon the person who held it all of the privileges which inhere in the ownership of land abutting on a navigable stream. Under such a condition of facts the important question which the court would be called upon to decide would be whether the defendants, by the acquisition of an easement for the purposes of their canal over the *ripa* covered by the complainant's title,—that is, by simply taking possession of such *ripa* and building their canal on it, and retaining possession of it for over forty years (for the defendants have shown no better or other title),—had so far succeeded to the privileges, which the owner of the *ripa* might otherwise have exercised over the shore lying in front of his land as to put it in their power to prevent him from exercising them. I believe no court in this state has as yet decided that where the Morris Canal & Banking Co. have, either by condemnation or by taking possession, acquired land abutting on tidewater simply for a part of their right of way, and not as a terminus, the right thus acquired gave them authority to exercise the privileges of a riparian owner. On the contrary, the truth is that serious doubts have always been expressed, whenever the question has received attention, whether, in view of the provisions of their charter, the defendants were competent to exercise the privileges of a riparian owner even over the shore of land which they hold by grant from the owner of the fee. The utmost extent to which the decisions on this question have as yet gone is this: That the canal company were competent to receive such privileges by grant from the owner of the fee, and thus cut him off from the right to exercise them; but it was doubtful whether they themselves could exercise them, or take them for any other purpose than to prevent their grantor from exercising them. This is the view expressed by the supreme court in *State v. Brown*, 3 Dutch. 13; and although the judgment pronounced in that case was subsequently reversed (*Brown v. Morris Canal & Banking Co.*, 3 Dutch. 648), yet the judgment of the supreme court as to the effect which should be given to a grant made by a riparian owner to the canal company has since been twice approved by the court of errors and appeals. *Hoboken Land & Improvement Co. v. Hoboken*, 7 Vroom, 540; *Fitzgerald v. Faunce*, 17 Vroom, 536.

The difference in the legal effect which must be attributed to the conveyance of an estate in fee, whether absolute or quali-

fied and the right which the defendants acquired by simply taking possession of land for a right of way, or condemning it for a like purpose, is wide and vital. Under a conveyance, even if it be of only a qualified fee, the defendants have, while their estate continues, by the plain terms of their grant, an absolute right to the exclusive possession of the land conveyed, and any attempt of their grantor to exercise any sort of possession over the land, or to use any part of it as a means of advantage or profit to himself, would be in plain derogation of his grant, and a clear violation of the defendants' rights. The defendants, under a deed conveying only a qualified fee, would, while their title continued, have the same right to the exclusive use and enjoyment of the land, and as complete dominion over it for all purposes, as though they held it in fee simple absolute; and no one, I suppose, would pretend that it would be possible for a grantor, after making a title of that description, to set up, with the least show of success, a right or interest of any kind in the land conveyed. But the defendants' right in lands acquired by any other means than by grant stands on an entirely different foundation.

Where the state invests a corporation with the sovereign prerogative of eminent domain, for the purpose of enabling them to construct and operate a public highway, and they take land by force of their charter, or by any other means than by grant, for the purposes of such highway, it is manifest that the plain purpose of the grant to them is not to give them capacity or invest them with power to take a fee, but merely to give them power to acquire such an easement in the land as will enable them fully to accomplish the purpose for which they were created. The plain design of the grant in such a case is to enable them to acquire what they require for the construction and successful operation of their highway, but nothing more. The title to the land taken remains in such cases in the owner, subject only to such servitude as the corporation has power to impose; and their power in this respect is limited, as a general rule, to such use of the land as may be reasonably necessary for a right of way. *Taylor v. New York & Long Branch R. Co.*, 9 Vroom; 28; 1 Redf. R. R. 270.

Such grants, like all public grants, are to be strictly construed. The grantee takes nothing except what is plainly given, either in express terms or by necessary and unavoidable implication. What is not plainly given is to be understood as withheld. Any ambiguity in the terms of his grant will be fatal to his claim. To doubt in such a case is to deny.

Deed to real
estate—Quali-
fied fee—
Rights under.

Eminent do-
main—Acqui-
sition under—
Fee.

Construction
of grants.

The canal at the place in dispute was not constructed under the original charter granted to the defendant on the 31st of December, 1824, but under a supplement passed January 26, 1828. By their original charter, the defendants were empowered, after locating the route of their canal, and without first making compensation, to enter upon, take possession of, and use all such lands, waters, and streams as were necessary for the purposes of their canal. They were authorized to take private property for the use of their canal, without first making compensation. Entry by them upon the lands of another, and appropriating the land to their own use for the purposes of their canal, neither constituted a trespass nor gave the owner a right to maintain an action of ejectment against them. *Kough v. Darcey*, 6 Halst. 237; *Den v. Morris Canal Banking Co.*, 4 Zab. 587; *Lehigh Valley R. Co. v. McFarlan*, 4 Stew. Eq. 706; 14 Vroom, 605.

Power conferred by original charter and by supplement.

By the supplement of January 26, 1828, the defendants were authorized to extend their canal from the Passaic river to the waters of the Hudson, but in making the extension they were not authorized to take any land until they first paid for it or tendered its appraised value to its owner. Under their original charter, their power to take land was subject to a very important limitation; and this limitation applied with equal force to all lands taken for the extension which were acquired by force of their charter and not by grant. By the twenty-seventh section it is declared that the defendants' power to take land shall be so construed as that they shall not be authorized to take or appropriate to the use of their canal, or under color or pretence that the same are necessary therefor, any lands, waters, or streams of water but such only as are actually necessary for the erection and use of their canal for the purposes of navigation only and its necessary towing-paths and works. This language, in my judgment, will bear but one interpretation, and that is, that, when the defendants, by force of the power conferred upon them by their charter, and not by grant or with the consent of the owner, acquired land for a part of the right of way of the public highway which

Defendants merely took easement—Fee in land-owner.

they were authorized to construct and operate there, they simply took such an easement or right in the land as it was reasonably necessary for them to have in order that they might build their canal, and afterwards use and operate it as a public highway. Or, to state what they took, as contrasted with what the land-owner retained, it may be said that the owner of the land was required to yield to the defendants such possession, use, and enjoyment of the land taken as it was necessary for them to have to enable them to fully accomplish the purposes of their creation, but nothing more. He retained the fee, and also all privileges and

incidents belonging to it, together with the right to make any use of the land which would not injuriously interfere with the defendants in the full and free use of their easement.

The word "lands" was used in this part of the charter, as I think, as the equivalent of "right or estate;" so that if the legislative purpose had been expressed with entire aptness, this clause would have read in this wise: That that part of the defendant's charter giving them power to take land shall be so construed as that they shall not be authorized to take any right or estate in lands taken by them for the purposes of their canal but, such only as shall be actually necessary for the erection and use of their canal for the purposes of navigation only and its necessary towing-paths and works.

That this is the construction which this clause of the charter should receive is made manifest, as I think, by a subsequent clause of the same section, which declares that the defendants shall not be authorized to demise, grant, alien, or sell any such lands, waters, or streams taken, or pretended to be taken, or required, for the use of their canal, to any person or persons whomsoever, except only such land as may be received by them by donation or acquired by them by private contract. These two clauses, when considered together, seem to me to leave the purposes of the legislature, in two respects, entirely free from doubt: first, that what the defendants should have the right to acquire should only be such in quantity, quality, and duration as should be reasonably necessary for them to have to fully accomplish the objects for which they were created; and second, that what they acquired should be inalienable, and that they should derive no benefit from it except such as might be obtained by using it for the purposes for which they were authorized to take it.

The words of limitation employed in both clauses demonstrate, I think, with great clearness, that it was an important part of the legislative scheme, in granting this charter, to rigidly restrict the right which the defendants might acquire, where they took land merely for a right of way, and by any other means than by grant, to such an easement as it should be necessary for them to have to fully accomplish the purposes of their creation, leaving the fee of the land in its owner, with good right and full power on his part to make any use of the land which would not deprive the defendants of the full beneficial enjoyment of their easement.

This construction puts the defendants' charter in complete harmony with what has always been considered a wise and just public policy on this subject in this state. In 1866 Chief Justice Beasley, in pronouncing the opinion of the court of errors and appeals in *Keyport & Middletown Point Steamboat Co. v. Farmers' Transportation Co.*, 3 C. E. Green, 516, said:

“Public sentiment, from the earliest times to this day, and the whole course of legislative action in this state, have recognized a natural equity, so to speak, in the riparian owner, to preserve and improve the connection of his property with the navigable water; and the consequence is that a strong presumption arises against all implication of an intention on the part of the legislature to violate such equity. In my opinion such a design should not be deduced from the words of any statute, either general or special, except when it contains language not susceptible of any other rational interpretation.”

Same—Riparian owner—Connection with tidewater—Right to preserve or improve.

In 1877 a statute was passed which declares that when land has been or shall be taken or granted for a right of way, and such right of way has been or shall be so located on the land of a riparian owner as to occupy the same along or on the shore line, and thereby separate the upland of such riparian owner, adjoining that used for such right of way, from tidewater, such owner of the land so subject to such right of way shall be held to be the riparian owner for the purpose of receiving any grant or lease heretofore or hereafter made of lands of the state under water, or for the purpose of receiving any notice under the act to which this is a supplement, or the supplements thereto. Rev. 987, § 29. So far as this statute was intended to be retrospective, it is unquestionably valid as against a person who at the time of its passage held merely an unexecuted license to fill in and dock out; for, until such license is executed, it is competent for the legislature to adopt any regulation respecting land lying below the high-water line which to it may seem wise and just.

This statute embraces, it will be observed, both lands taken or condemned, and lands granted; and while it must be admitted that the complainant's case does not fall within its precise words,—for it owns no upland adjoining the land taken by the defendants for their right of way which is separated, by the land occupied by the right of way, from tidewater, because, under the theory of fact on which the case is now being considered, the right of way occupies the whole of the upland or *ripa* covered by the complainant's title,—still I think the statute has a very important bearing on this case. It puts in the form of positive law what, prior to its enactment, existed only as a deduction to be made from a local custom or principle of local common law. The statute was undoubtedly passed to clear up doubts, which it was thought might exist, respecting the rights of two different classes of persons in the same piece or tract of the public domain. There is nothing on its face which indicates an intention on the part of the legislature to take anything from the riparian owner; on the contrary, its main purpose seems to be to make his rights more certain and secure. Nor was it designed to establish a

new rule of law ; for it never was the law that the acquisition of a mere easement by one person in the land of another operated to transfer the fee, or to deprive the owner of the servient land of the right of making any use of it which did not interfere with the full and free enjoyment of the easement. The principal design of the statute, as I read it, was to declare what before was, on general principles of law, entirely certain and clear ; and that is that the acquisition by a canal or railroad company of an easement, simply for a right of way over the lands of a riparian owner, along or on the shore of his lands, should not operate to deprive him of his right or equity to preserve and improve the connection of his land with tidewater.

If we adopt the construction above indicated as the construction which this part of the defendants' charter must, as a matter of law, receive, it would seem to be entirely clear that although the fact may be, just as the defendants say it is, that all of the *ripa* embraced within the complainant's title is now covered by the canal and towpath, and has been so covered ever since the completion of the canal, still, as the complainant holds the fee in such *ripa*, and the defendants have no estate or right in it, except an easement over it, and as the complainant may exercise all of the privileges of a riparian owner over the land lying in front of such *ripa*, without, in the slightest degree, interfering with the defendants in the full and free use of their easement, or doing them any harm or injury—it is the duty of the court to adjudge that, as between the parties to this suit, the title to the lands in dispute is in the complainant, subject, however, to an easement in favor of the defendants to use, as a part of their right of way, so much thereof as they held and occupied for twenty years or more prior to the time when this suit was instituted. That is my judgment as to the rights of the parties in the land in dispute, assuming the line of high-water to be just where the defendants by their answer say it was.

But I think the complainant's right to the land in question may, under the proofs, be adjudged to stand on a broader and stronger foundation than that just indicated. The defendants show no title to the subject of the dispute, as against any of the persons under whom the complainant claims, except such as arises from possession and use for over forty years. They have never used any of the land in dispute for any other purpose than as a part of their right of way ; and if their right is to be limited by their user, it must necessarily be confined to a simple easement. The complainant says, by its bill, that the canal of the defendants, as located and constructed, did not extend to the shore line or to ordinary high-water mark of the Passaic. Its claim is, that after the completion of the canal there existed between the foot of the slope of the towpath and the high-water

line of the Passaic, and lying right adjacent to the foot of the towpath, a strip of land, varying in width from ten feet to forty, extending along the whole of the *locus in quo*, which was never touched by the waters of the Passaic at an ordinary high tide. This claim constituted the principal subject of contest on the hearing of the case; and a vast volume of evidence, embracing almost every variety of proof which it was possible to offer in elucidation of such an issue, was adduced both in its support and refutation. To classify and arrange the whole body of the evidence produced on this branch of the case, and put it in a form to render it intelligible, so that its relative force and weight may be easily seen and appreciated, would extend this opinion much beyond the usual length of such a paper. I shall not, therefore, attempt to do so, but, in stating the reasons for my judgment, shall content myself with simply calling attention to such parts of the evidence as, in my opinion, serve to demonstrate, with the greatest force and directness, what the truth is respecting this claim. In this connection I think, however, it should be stated that the whole of the evidence touching this question has been examined and considered with studious care, and that the effect produced on my mind by that to which no allusion will be made is, in its general result, precisely the same as that to which I propose to direct attention.

From 1833 to 1850—a period of about seventeen years—Mr. James H. Tichenor owned the land in question, and also a farm lying adjacent to it. He resided on the farm from 1833 to 1836, and again from 1844 to 1849. His farm lay east of the land in dispute; and in passing from his farm to Newark, and back again, he passed over the land in question, or by it. From 1833 to 1836, he says, he passed over or along the disputed territory almost daily, and subsequently, up to 1850, very frequently; and he swears that during all that time there was a strip of land, varying in width from twenty feet to thirty, lying between the canal and the river, which was never covered by the water of an ordinary high tide. As he was the owner of the land it was natural that his observation of its condition should have been somewhat closer and more thorough than that of a person having no interest in it; and that his recollection of what he saw should be more perfect, and remain with him longer, than that of a person casually looking at the land with neither interest nor object. Mr. Tichenor conveyed the land in controversy, together with other land, to the New Jersey Exploring & Mining Co., on the first of May, 1850. Dunn & Thompson—who were engaged in surveying lands in the city of Newark from 1844 to 1856—in June, 1850, made a survey and map of the land so conveyed. Mr. Dunn is dead, but Mr. Thompson is living, and was examined as a wit-

Evidence examined and considered.

ness in this case. After an examination of the map made by his firm in 1850, Mr. Thompson testified that the map was made from an actual survey which he and Mr. Dunn made together, and that his recollection was that at the time the survey was made there was a strip of land, from ten feet to thirty and upwards in width, lying north of the foot of the towpath, extending along nearly the whole of the *locus in quo*, which was not covered by water at an ordinary high tide.

Mr. Eliphalet C. Smith (who was assistant surveyor of the city of Newark from 1837 to 1839, and city surveyor from 1843 to 1848, and assistant engineer on that part of the canal extending from Newark to the waters of the Hudson from 1833 to 1835), testified that while engaged on the canal he resided in the city of Newark, and that, in going to and from the point where his duties required him to be, he passed, every day, on the towpath, along the place in dispute; and also that while he was assistant surveyor of the city of Newark he made surveys on the disputed territory, for the purpose of collecting material to be used in making a map of the city of Newark; and that in collecting such material he was necessarily required to measure the distance, at the place in dispute, from the foot of the towpath to the high-water line of the Passaic. He swears that after the completion of the canal there was no point on the lands in dispute where the foot of the towpath was coincident with the high-water line; that it would not have been good policy to have located the towpath so that tidewater, at high tide, would have washed it; but his recollection was that between the bottom of the towpath and the high-water line there was a strip of upland varying in width from ten feet to thirty.

Dr. Alexander, the superintendent of the chemical works, whose testimony, in consequence of his caution, strong sense of justice, and high regard for the truth, is, in my judgment, entitled to the very highest consideration, says that after 1872, and before the filling in was done, there existed at the line of the chemical works, extending westerly for the distance of four or five blocks, quite a little strip of land between the bottom of the slope of the towpath and the high-water line of the Passaic.

There is a large amount of other evidence, on the part of the complainants, of the same general character. Stated in its substance, it shows that there was, between the foot of the towpath and the waters of the Passaic, along the whole of the disputed territory, from the time the canal was built until tidewater was excluded by the filling in, a considerable strip of upland which the waters of an ordinary high tide never touched. If this evidence is believed, there can be no doubt about the complainant's right to a decree. It establishes the fact that there was a suffi-

cient *ripa*, lying north of the towpath, to entitle the complainants to be regarded as riparian owners.

The defendant's evidence on this branch of the case quite equals in bulk, if not in weight, the evidence of the complainants. They show by many witnesses—some of them gentlemen of prominence and high respectability—that, on the completion of the canal, the foot of the towpath along the whole of the territory in dispute was either coincident with the high-water line of the Passaic, or extended below it into the river. Mr. Roswell B. Mason, who had charge of the location of the route of that part of the canal extending from Newark to the waters of the Hudson, swears that after the towpath was built there was no land between the foot of the towpath and the high-water line, at any point on the disputed territory, but that in many places the towpath was built on land which was covered by tide-water at an ordinary high tide. His brother, Mr. Arnold G. Mason, who assisted, as an engineer, in constructing this part of the canal, gave substantially similar evidence. But neither of these gentlemen, until just before they gave their testimony, had seen the *locus in quo* for over forty-five years. In the interval the disputed territory and all its surroundings had undergone many and very great changes. During nearly the whole of this long period both of them resided at points remote from the place in question, and, so far as appears, nothing had occurred during its lapse which directed their attention to it in such manner as to have the least tendency to either freshen or preserve their recollection of its condition when they left it. That they believe that they retain anything like an accurate recollection of the situation, under the circumstances, seems to me to be quite extraordinary; for I think that the observation and experience of most men—especially those living busy and active lives—show that where a person possessing only an ordinary memory is deprived of all opportunity for over forty years of seeing, at intervals, a particular place or situation with which he was once familiar, and nothing has occurred in the interim to direct his attention to it and cause him to think about it, and thus preserve his recollection of it, that before the lapse of half the period named every trace of the picture, which at one time existed in a perfect state on his memory, will be so far obliterated that, if he attempts to reproduce it, he will be compelled, in many important parts, to substitute fancy for fact. And it is possible for him to do so without being fully conscious that he is fabricating; for, if he has a dim recollection of a part of the picture, his imagination will suggest what the balance of it ought to be, and it will therefore be easy for him; in his effort to revive his recollection, to mistake what is purely the work of his imagination for recollection.

As already stated, many other witnesses called by the defendants gave evidence which, in its substance, is identical with that given by the Messrs. Mason. They nearly all swear that, after the completion of the canal the foot of the towpath was either coincident with the high-water line or extended below it. They are all persons of such character and standing as entitles their testimony to full consideration. But the vital fact, as they state it, appears to me to be so improbable that their evidence, especially when contrasted with that produced by the complainants, must be rejected as incredible. I do not believe that any civil engineer of sufficient reputed capacity to be placed in charge of so important a work as the construction of this canal would have located the foot of its towpath at the high-water line, on a stream like the Passaic, except under the pressure of reasons so imperative in their character as to leave no other location open to him. None such seem to have existed in this case; and if the towpath was located where the defendant's witnesses say it was, it was put there from choice, and not from necessity. That it should have been done from choice, in view of the actual condition of affairs then existing, as the proofs (about which there is no dispute) show, is a thing which, I think, is incapable of belief by any discriminating mind. The Passaic is subject to freshets, its waters at such times rising to a very considerable height. The trend of the river at the place in question at the time the canal was built was towards the canal, the river at that point lying somewhat in the form of a half circle, with the top of the curve or its greatest extension nearly opposite the middle of the *locus in quo*. The channel of the river ran near its south bank, and the main force of its current struck against that bank. Mr. David H. Tichenor, one of the defendants' witnesses, in describing the river and its shore at the point in question (just before the construction of the canal), says that there was more current there than either above or below, and that after heavy rains the current bore against the south bank and wore it away. Land, at the place in question, was very cheap when the canal was built; the defendants in no instance being required to pay, on a condemnation valuation, more than \$15 an acre, including damages, and in some instances only \$5 an acre. The towpath at this point was constructed of loose earth taken from the excavation made for the bed of the canal. If it had been located where the defendants say it was, it is as certain as anything can be which is governed by the law of nature that the very first considerable freshet which occurred in the Passaic after it was built would have swept it away. That it never was washed away by a freshet demonstrates, as I think, quite conclusively, that it was located above the high-water line. Competent engi-

neering, as well as ordinary good sense, would have located it there. I have no doubt it was located there.

The proofs, in my opinion, fully establish the fact that there was and is a *ripa* north of the foot of the towpath, along the whole of the territory in dispute, sufficient in extent to constitute the complainants riparian owners.

This conclusion renders it unnecessary to consider any of the many questions started by the defence on the assumption that no such *ripa* existed.

The complainants are entitled to a decree adjudging that they hold the land in dispute by a good and valid title, and that the defendants have no right or interest in it, except a right of way for their canal and towpath over so much of it as their canal and towpath now occupy. The complainants are also entitled to costs.

Eminent Domain—Delegation of Power.—While the right of the exercise of the power of eminent domain rests within the discretion of the legislature, it may be and generally is affected by a delegation to an agent, which agent may be a corporate body carrying on a work of public utility though for purposes of private gain. *Lecombe v. Milwaukee & St. P. R. Co.*, 90 U. S. (23 Wall.) 108; bk. 23 L. ed. 67; *Warren v. First Div. St. P. & P. R. Co.*, 18 Minn. 384; *Weir v. St. Paul S. & T. F. R. Co.*, 18 Minn. 155; *Leisse v. St. Louis, etc., R. Co.*, 2 Mo. App. 105; *Swan v. Williams*, 2 Mich. 427; *Ash v. Cummings*, 50 N. H. 591; *Tinsman v. Belvidere Del. R. Co.*, 26 N. J. L. (2 Dutch.) 148; s. c., 69 Am. Dec. 565; *Matter of Bloomfield, etc., Gas Light Co. v. Richardson*, 63 Barb. (N. Y.) 437; *Bloodgood v. Mohawk & H. R. Co.*, 18 Wend. (N. Y.) 9; s. c., 31 Am. Dec. 313; *Alexandria & F. R. Co. v. Alexandria & W. R. Co.*, 75 Va. 780; s. c., 10 Am. & Eng. R. R. Cas. 23.

It is thought that the power of eminent domain cannot be delegated to individuals or private persons, although there is a line of authorities which seem to favor that doctrine. See *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165; s. c., 15 Am. Dec. 462; *Young v. Buckingham*, 5 Ohio 485. If individuals can in any instance exercise the power of eminent domain, it is thought that only under the same conditions and with the same limitations imposed with the same corporations. See *Reisner v. Strong*, 24 Kan. 410; s. c., 10 Am. & Eng. R. R. Cas. 335; *Brown v. Beatty*, 34 Miss. 127; s. c., 67 Am. Dec. 389.

A delegation of the power of eminent domain may rightfully be made to:—

1. *To Municipal Corporations.*—*Polack v. Trustee of San Francisco Orphan Asylum*, 48 Cal. 490; *Southern Pac. R. Co. v. Read*, 41 Cal. 256; *Geiger v. Filor*, 8 Fla. 325; *Savannah & T. R. Co. v. Savannah*, 45 Ga. 602; *Wiggins Ferry Co. v. East St. L. R. Co.*, 107 Ill. 450; s. c., 20 Am. & Eng. R. R. Cas. 9; *Chicago R. & P. R. Co. v. Joliet*, 79 Ill. 25; *Murphy v. Chicago*, 29 Ill. 279; *Moses v. Pittsburgh, Ft. W. & Chi. R. Co.*, 21 Ill. 516; *Indianapolis & C. R. Co. v. State*, 37 Ind. 489; *Slatten v. Des Moines R. Co.*, 29 Iowa, 148; s. c., 4 Am. Rep. 205; *Cosby v. Owensburgh R. Co.*, 10 Bush (Ky.), 288; *Wolfe v. Covington & L. R. Co.*, 15 B. Mon. (Ky.) 404; *Hoyle v. New Orleans R. Co.*, 23 La. An. 535; *Knight v. Carrollton R. Co.*, 9 La. An. 284; *New Orleans & C. R. Co. v. Municipality*, 1 La. An. 128; *Mathews v. Kelder*, 58 Me. 656; s. c., 4 Am. Rep. 248; *Springfield*

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v. Connecticut R. Co., 58 Mass. (4 Cush.) 63; *State v. Hoboken*, 35 N. J. L. (6 Vr.) 205; *Patterson & P. H. R. Co. v. Patterson*, 24 N. J. Eq. (9 C. F. Gr.) 158; *Jersey City & H. H. R. Co. v. Jersey City & B. R. Co.*, 21 N. J. Eq. (6 C. E. Gr.) 550; *Morris & F. R. Co. v. Newark*, 10 N. J. Eq. (2 Stockt.) 352; *Carpenter v. Oswego & S. R. Co.*, 24 N. Y. 655; *Portland v. Multnomah Co.*, 6 Oreg. 62; *Black v. Philadelphia & F. R. Co.*, 58 Pa. St. 249; *Mercer v. Pittsburgh, Ft. W. & C. R. Co.*, 36 Pa. St. 99; *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339; s. c., 67 Am. Dec. 471; *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *Green v. Reading*, 9 Watts. (Pa.) 382; *Henry v. Pittsburgh & A. Bridge Co.*, 8 Watts. & S. (Pa.) 85; *In re Philadelphia & T. R. Co.*, 6 Whart. (Pa.) 25; *Tennessee & A. R. Co. v. Adams*, 3 Head (Tenn.), 596; *Richmond F. & P. R. v. City of Richmond*, 96 U. S. (6 Otto) 521; bk. 24 L. ed. 734; *Barney v. Keokuk*, 94 U. S. (4 Otto) 324; bk. 24 L. ed. 224; s. c., 4 Dill. C. C. 593; *People's R. R. v. Memphis R.*, 77 U. S. (10 Wall.) 38; bk. 19 L. ed. 844; *Pacific R. Co. v. Leavenworth*, 1 Dill. C. C. 393. *Compare City of Quincy v. Chicago B. & Q. R. Co.*, 92 Ill. 21; *Chicago & N. W. R. Co. v. Elgin*, 91 Ill. 251; *Lexington & O. R. Co. v. Applegate*, 8 Dana (Ky.), 289; s. c., 33 Am. Dec. 497; *Louisville & F. R. Co. v. Brown*, 17 B. Mon. (Ky.) 763.

2. *To Railroad Companies.*—The power of eminent domain may be delegated to railroad companies to enable them to operate such lands as they may need for purposes directly connected with their business. See, *Southern Pac. R. Co. v. Raymond*, 53 Cal. 223; *Stohecker v. Alabama & C. R. Co.*, 42 Ga. 409; *Low v. Galena & C. U. R. Co.*, 18 Ill. 324; *Chicago B. & Q. R. Co. v. Wilson*, 17 Ill. 123; *Prather v. Jeffersonville M. & I. R. Co.*, 52 Ind. 16; *Graham v. Connorsville & N. C. J. R. Co.*, 36 Ind. 463; s. c., 10 Am. Rep. 56; *Protzman v. Indiana & C. R. Co.*, 9 Ind. 467; 68 Am. Dec. 650; *Reed v. Louisville Bridge Co.*, 8 Bush (Ky.) 69; *Hamilton v. Annapolis & E. R. Co.*, 1 Md. 553; *Mansfield, C. & L. M. R. Co. v. Clark*, 23 Mich. 519; *Weir v. St. Paul, S. & F. R. Co.*, 18 Minn. 155; *Hannibal & St. Joseph R. Co. v. Muder*, 49 Mo. 165; *Virginia & T. R. Co. v. Elliott*, 5 Nev. 358; *State v. Mansville*, 23 N. J. L. (3 Zab.) 510; *In re New York Cent. R. Co.*, 77 N. Y. 248; *In re New York Cent. R. Co. v. Metropolitan Gas Co.*, 63 N. Y. 326; *New York & Hudson R. R. Co. v. Kip*, 46 N. Y. 446; s. c., 7 Am. Rep. 387; 67 N. Y. 227; *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137; *In re New York Cent. R. Co.*, 67 Barb. 426; *Toledo & W. R. Co. v. Dansville*, 16 Ohio St. 390; *Giesey v. Cincinnati, N. & Z. R. Co.*, 4 Ohio St. 308; *Cumberland V. R. Co. v. McLanahan*, 59 Pa. St. 32; *Cleveland, etc., R. Co. v. Spear*, 56 Pa. St. 325; *Philadelphia, W. & B. R. Co. v. Williams*, 54 Pa. St. 103; *Lodge v. Philadelphia, W. & B. R. Co.*, 8 Phila. (Pa.) 345; *South Carolina Co. v. Blake*, 9 Rich. (S. C.) L. 228.

3. *To Other Corporate Bodies.*—For a full discussion of the power of the legislature to delegate to other corporate bodies the power to exercise the right of eminent domain, see 6 Am. & Eng. Encyl. of L. III, 4, p. 520.

PITTSBURG, WHEELING AND KENTUCKY R. CO.

v.

BENWOOD IRON WORKS *et al.*

(*West Virginia Supreme Court of Appeals, December 15, 1888.*)

Eminent Domain—Public Use—Judicial Question—Review on Appeal.—Whether the use to which property sought to be taken under the exercise of eminent domain is public or private is a judicial question, subject to review by the appellate court.

Same—Public Benefit—Evidence of Use.—Evidence that all who wish to avail themselves of the proposed switch, branch road, or lateral work can do so is not sufficient to show the use of the work will be for the benefit of the public.

Same—Railroad Companies—Private Property.—The property of railroad corporations, so far as concerns the ownership thereof, and the profit or gain to be made from their use, is to all intents and purposes private property, although applied to a use in which the public have an interest.

Same—When Power of Exercised—Property Needed for Private Advantage.—As far as the public is concerned, when what railroad corporations need is for "public use," they have the right to invoke the exercise of eminent domain; but, in so far as that which concerns them as to their private interests, their profits and gains are concerned, they stand as individuals, or merely as private corporations, in which the public has no concern, and for such private purposes cannot call into exercise the power of eminent domain.

Same—Switch to Manufactory—Private Use.—Where a railroad corporation sought to condemn land, over which to build a switch, branch-road or lateral work, to reach a private manufactory, a steel mill, for the purpose of transporting freight to and from said steel mill over petitioner's road, *held*, the use to which the land was to be subjected was a private, not a "public, use."

ERROR to Circuit Court, Marshall County.

Petition by the Pittsburg, Wheeling & Kentucky R. Co., to condemn certain lands belonging to the Benwood Iron Works and others. Judgment for plaintiff, and defendants bring error.

Caldwell & Caldwell for Iron Works.

Ewing, Melvin & Riley for Benwood.

W. P. Hubbard for plaintiff.

JOHNSON, P.—This is a condemnation proceeding. The plaintiff is a domestic corporation, incorporated by chapter 54 of the acts of the extra session of the legislature of 1868, and its name then was the "Pan Handle R. Co.," and was incorporated "for the purpose of constructing a railroad from Hollidays Cove R., in Brooke county, to the town of Wellsburg, and thence to the city of Wheeling." By the second sec-

Facts.

tion it was declared that said company should "be subject to all the provisions, and entitled to all the benefits, now conferred by law upon internal improvement companies, . . . and especially to the provisions of chapters 56, 57, and 61 of the Code of Virginia." By chapter 77 of the Acts of 1869 it was authorized "to extend its road from the city of Wheeling in the direction of the Kentucky state line, through such sections of the state contiguous to the Ohio river as said company may deem most desirable." By chapter 52 of the Acts of 1871, the corporation name was changed to the "Pittsburg, Wheeling & Kentucky R. Co." By section 5 of chapter 61 of the Code of 1860 it is provided that "the president and directors of any company incorporated to construct a railroad or other work of internal improvement may cause to be made, in connection therewith, branch railroads, or lateral works, not exceeding two miles in length; and, under a resolution adopted in general meeting by two thirds of all the votes of all the stockholders, may cause to be made branch railroads or lateral works, not exceeding ten miles in length." Section 69 of chapter 54 of the Code of West Virginia, 1887, provides that "any railroad company organized under this chapter may build and construct lateral and branch roads or tramways, and of any gauge whatever not exceeding fifty miles in length." By section 67 of the same chapter it is provided "that all existing railroad corporations within this state shall respectively have and possess all the powers and privileges, and be subject to all the duties and liabilities and provisions, contained in this chapter."

On the 29th day of October, 1886, the plaintiff tendered its petition to the circuit court of Marshall county, alleging that it had constructed its railroad to Benwood, in Marshall county. That "recently, and since the construction of said railroad, a corporation known and called the 'Wheeling Steel Works Co.' has erected a steel plant or works in the said city of Benwood, in said county, which plant lies next east of the Benwood Iron Works. Said steel company produces large quantities of steel, and consumes large amounts of material, and your petitioner's said road is now unable to transport any of said steel or material, by reason of its having no track reaching to or into said steel works. In order to reach said steel works by a track or switch leading from its said main track, your petitioner avers it is necessary to take certain lands hereinafter fully described. Said switch or track is to be constructed for the purpose of transporting freights to and from said steel works over your petitioner's said railroad." The description of the first lot sought to be taken is as follows: "Beginning at a point in the southern line of a street parallel to, and 276½ feet distant northerly from, the Benwood Nail Factory,—said point being 125

feet westwardly from the west line of Second street, in said city of Benwood; running thence in a southerly direction, on a curved line to the left, having a radius of $350\frac{1}{10}$ feet, parallel to, and 8 feet distant eastwardly from, the center line of the side track leading from the main track of the Pittsburgh, Wheeling & Kentucky R. into the Wheeling Steel Works, a distance of 3 feet; hence, on a reversed curved line to the right, having a radius of $366\frac{1}{10}$ feet, still parallel and 8 feet distant eastwardly from said side track, a distance of $233\frac{1}{2}$ feet, to the said west line of Second street; thence by said line of said street south, 20 degrees and 42 minutes west, 28 feet, to a line parallel to, and 60 feet distant northwesterly from, said Benwood Nail Factory; thence by said line north, 69 degrees and 18 minutes west, 34 feet; thence, on a curved line to the left, having a radius of $326\frac{1}{10}$ feet, parallel to, and 32 feet distant westwardly from, the said side track, a distance of $224\frac{3}{10}$ feet; thence on a reversed curved line to the right, having a radius of $390\frac{1}{10}$ feet, a distance of $52\frac{2}{10}$ feet to the southern line of the first-mentioned street; thence by said line of said street south, 69 degrees and 18 minutes east, $62\frac{1}{2}$ feet, to the place of beginning,—containing an area of $\frac{34}{100}$ of an acre, more or less." The second parcel is also described in like manner, and contains an area of $19\frac{1}{100}$ of an acre. A plat is exhibited with the petition, which shows the exact location of the land sought to be taken, and is made a part of the petition.

The petition shows that the whole of the first parcel of land is owned by the Benwood Iron Works, a corporation under the laws of West Virginia, and engaged in the manufacture of iron and nails; that there are no liens on said parcels of real estate, and no buildings or other improvements thereon, and lying open and unused; that it is unable to agree with said Benwood Iron Works in relation to the price of said parcel of land, the said company refusing to sell it for any price; and that said parcel of land is necessary for the construction of petitioner's said track. The petitioner avers that the second parcel of land is partially claimed by different persons. The north 60 feet is claimed by Mrs. Hannah McMechen, H. B. McMechen, and Eliza McMechen Mayes, as the devisees in fee of the late Hiram McMechen, while at the same time the Benwood Iron Works claims to be the owner thereof in fee, and the city of Benwood claims that it constitutes a part of one of the public streets of the city; that the remainder of said parcel of land is claimed in fee by the Benwood Iron Works. Notice was served on the parties, and the petitioner prayed the court to appoint commissioners to ascertain what will be a just compensation to the parties owning said parcels of land sought to be taken, etc.

The plat shows that to go to said steel works two streets of

the city of Benwood would have to be crossed, and that it would diagonally cut the vacant lot, and passing along Second street, and partly on the land of the Benwood Iron Works, and between the iron works, terminate at the steel works. When the petition was presented the city of Benwood appeared, and objected to the filing of the petition, but the court overruled the objection, and permitted the same to be filed. On the 7th of April, 1887, on demurrer to said petition, the court held "that the use set forth in the petition to which the track of the railroad is to be put, for which the lands are sought to be condemned, are not public uses, and the prayer of the petitioner should be denied." Whereupon the petitioner asked leave to amend its petition, to which the Benwood Iron Works and the city of Benwood objected, but the objections were overruled, and the leave was granted. On the 29th day of June, 1887, the petitioner tendered its amended petition in pursuance of the leave granted by the court. The city of Benwood and the Benwood Iron Works filed their objections in writing to the filing of said amended petition, and the city of Benwood filed its demurrer in writing to said petition, and said objections and demurrer were argued, and taken under consideration by the court, and the court overruled the objections and the demurrer, and permitted the petition to be filed, and notice was ordered to be given the defendants who had not appeared. The description of the property in the amended petition, and the lines of the side track, are substantially the same as set out in the original petition, and is accompanied with the same plat. The only material difference in the two petitions is the declaration of the purpose for which said side track, called in the amended petition a "branch railroad and lateral work," is to be used. In the amended petition it is alleged "that the railroad so constructed is now owned by your petitioner, and is used and operated for the transportation of passengers and freight, under and in accordance with the laws of the state of West Virginia, and for all the public uses imposed upon railroads by such laws. Your petitioner now desires and intends, in accordance with law, and in the exercise of the further authority conferred upon it by its charter and the laws of this state, to build and construct a branch railroad and lateral work, not exceeding two miles in length, from a point on its main line, in the city of Benwood, and some distance north of the nail factory of the Benwood Iron Works, to a point opposite and west of the southern end of the steel mill of the Wheeling Steel Works, also in the city of Benwood. The branch railroad and lateral work so to be constructed by your petitioner is to be a public highway, and free to all persons for the transportation of their persons and prop-

erty thereon, under such regulations as may be prescribed by law, and is to be for public use."

The city of Benwood answered, to which answer the petitioner objected, and denied the right of the petitioner to condemn its street, or a part thereof, to build a switch to the works of a private corporation. It then sets out the streets that would be invaded, and shows what inconvenience would result to the city; that Second street is now partially obstructed by a railroad track constructed to the Wheeling Steel Works from the track of the Ohio River R., over which road the petitioner has the right to pass, and does pass to and take and unload freight at the Wheeling Steel Works; that the further obstruction of the street, as proposed, would render it valueless and impassable as a public highway for the city, which is necessary and indispensable.

The objections of the Benwood Iron Works to the filing of the amended petitions are, in substance, that it is insufficient in law, and does not show that the lands sought to be taken are to be condemned for a public use, within the meaning of the constitution of this state; because the uses for which the said lands are sought to be taken, as stated in the original petition, did not constitute a public use, and the amended petition only sets forth in more general language the uses for which the lands are sought to be taken, and does not use any language which is inconsistent with the proposed railroad being used solely for the uses set out in the original petition; the amended petition, including its exhibits, is inconsistent with itself, etc.

The Benwood Iron Works filed its answer, to which the petitioner objected. The answer alleges that it was applied to a short time before July, 1886, by C. D. Hubbard, president of the petitioner, to ascertain on what terms it would sell to the railroad company the right of way through its grounds; that the matter was laid before the board of directors of the Benwood Iron Works, and the board refused to sell at any price, because it had been for a long time and was reserving said ground, for the purpose of erecting thereon a blast-furnace. It avers that the Wheeling Steel Works induced the petitioner to ask to have the lands condemned; that since the filing of the original petition the Wheeling Steel Works has bought from the Benwood Iron Works the ground south of the main works, on which to stand and shift cars laden with freight consigned to or by that corporation; that the petition, though nominally that of the railroad company, is really that of the steel-works: that the purpose is revealed in the original petition, as follows: "Said switch or track is to be constructed for the purpose of transporting freights to and from the said steel-works;" that this is not a purpose useful to the public, but to the steel-works; that

it is still true, as stated in the original petition, that the Wheeling Steel Works has erected a steel plant or works in the city of Benwood, which lies next east of the Benwood Iron Works, while petitioner's main track lies west of the said Benwood Iron-Works; said steel company produces large quantities of steel, and consumes large amounts of material; and said switch or track is to be constructed for the purpose of transporting freights to and from said steel-works over petitioner's road. It denies that the switch, track, railroad and lateral work mentioned in the amended petition is to be a public highway, and free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law, and that it is for public use, etc.

On the 18th day of November, 1887, the parties came, etc.; "and the court, having maturely considered the answers heretofore tendered by the Benwood Iron Works and the city of Benwood to the amended petition herein, and having also considered the objections heretofore made by said answers, and argued by counsel; and the court, being of opinion that nothing alleged in said answers constitute a bar to the appointment of commissioners, to ascertain a proper compensation for the land sought to be taken, except so much of the answer of the Benwood Iron Works as denies that the branch or lateral work mentioned in the amended petition is to be a public highway, and free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law, and that it is to be for public use, and also so much as avers that the said amended petition, though nominally that of the railroad company, is really that of the Wheeling Steel Works Co.—doth overrule the objection to these parts of the answer of the Benwood Iron Works, and doth sustain all the other objections of the petitioner; and the petitioner now replying generally to the averments of the answer of the Benwood Iron-Works as to which the petitioner's objections were overruled, and issue being joined, upon the matters alleged in the petition and so much of the answer as remains, it is ordered that testimony on that issue be taken by deposition," etc.

On the 11th day of February, 1888, the matter came on to be further heard "upon the issue joined on so much of the answer of the Benwood Iron-Works as denies," etc., stating it; upon the depositions of the witnesses C. D. Hubbard, J. M. Belville, Alonzo Loring, and A. N. Wilson, with the exhibits therewith, and upon the original entries in the minute-book of the board of directors of the Benwood Iron-Works, copies whereof were filed with the depositions, etc.; and upon the acts of the legislature, to-wit, the act of incorporation, passed July 15, 1868, the act of March 1, 1869, permitting the extension of the road, and

the act of February 16, 1871, changing the name of the corporation to what it now is; upon consideration of which the court found for the petitioner on the issues joined; and thereupon it was considered by the court that proper notice had been given, and that the said petitioner has lawful right in this proceeding to take, for the purposes stated in the amended petition, the several parcels of land in its said amended petition mentioned and described, and for such purposes to acquire title to said parcels upon just compensation; to which ruling and judgment of the court the defendant the Benwood Iron Works excepted, and tenders its bill of exceptions thereto, and asked that the same might be signed and sealed by the court, and made a part of the record therein, which was accordingly done. The court then proceeded to appoint the commissioners. To this order the Benwood Iron Works obtained a writ of error and *supersedeas*.

The main question to be decided is, was the use, for which the lands sought to be condemned were to be put, a public use? If not, then, of course, the lands could not be legally condemned, under the law of eminent domain. If the use were public, then it matters not if the Benwood Iron-Works had for 20 years reserved its lot for the purpose of building a blast-furnace thereon. It could be taken for public use, and the loss to it could be compensated in damages. The question here is not one of compensation, but it is whether the petitioner had a right to take the property. It, of course, has no right to take private property for private use, but it has the right to take private property for public use on paying a just compensation therefor. The right to take, which depends upon whether it is to be taken for public or private use, is a judicial question, and the decision of the circuit court on that question is subject to review. *Railroad Co. v. Railroad Co.*, 17 W. Va. 812.

Question presented—Right to take—Public use.

There were issues made in the case, and evidence taken thereon. One of these issues—whether the Wheeling Steel Works was not in fact the real party asking for the condemnation—was properly decided in the negative. I am unable to perceive the necessity of the issue as to whether the use to which the property was to be devoted was public, as it seems to me that question might have been decided from the face of the petition, and the exhibits filed therewith.

Party asking for condemnation.

Another issue was whether the road or switch was to be a public highway, and free to all persons for the transportation of their persons and property thereon. The evidence on this subject is short, and I will give the substance of it. The Wheeling Steel Works is a corporation whose stock is owned, and which was built, by three other corporations, to-wit, the defendant the Benwood Iron Works, the Wheeling Iron & Nail Co., and

the Belmont Nail Co. These three companies each furnished three directors to control the Wheeling Steel Works, as its board of directors. The steel works had had some trouble in making its shipments, but it is not shown that it induced the petitioner to institute condemnation proceedings. C. D. Hubbard, who is the president of the petitioner, and interested in the Wheeling Iron & Nail Co., in his deposition was asked, after reading to him the purpose for which the condemnation was sought, as it appears in the original petition, "Are not these averments of the original petitioner true, and is not the purpose for which the switch or track is proposed to be constructed correctly set forth in the original petition?" He answered: "I think they are substantially true; we have no track of our own, and are subject to the courtesy of two different railroads to get there, and to pass over part of the Ohio River R. and part of the Baltimore & Ohio R. and are liable at any time to be shut out by either railroad,—that is, the Ohio River or the B. & O.

Evidence as to whether switch was to be public highway.

Question. How much of the Ohio River road did you have to run over after leaving the southern end of the Pittsburg, Wheeling & Kentucky R. before your cars would strike the Wheeling Steel-Works' track after it crossed the B. & O. road? *Answer.* I cannot say how much of the main line of the Ohio River R. we have to pass over, but sufficient to enable us to get onto the switch by which the Ohio River road connects with the Baltimore & Ohio R. in order to make connection with the track of the Wheeling Steel Works. *Q.* When you were asked whether the averments in the original petitions were true, and whether the purposes for which the switch or track proposed to be constructed over the ground the P., W. & Ky. R. seeks to condemn in these proceedings were correctly set forth, you said: 'I think they are substantially true.' I ask you to read question 29, now handed you, and state in what respect those averments are not literally true, as applied to the amended petition in these proceedings. *A.* I would like to see the original petition." It was handed to him, and he answered: "My answer referred mainly to the location of the track, and the closing part of the question, which sets forth the purposes of the track, escaped my attention. The purposes are largely to secure the business of the steel-works. They would be open for the use of any other parties having anything to ship over it, and in that respect my answer was not entirely correct. *Q.* What other parties can you suggest would have use for shipping anything over the track laid on the ground now sought to be condemned, except those desiring to transport freight to and from the Wheeling Steel Works? *A.* It could be used by any of the citizens of Benwood,—the Benwood Iron Works, as the

track would run between their two nail factories, and we have on the P., W. & Ky. R. no other track or siding at Benwood, on which to deliver or receive freight from the citizens of Benwood or others wanting to ship. *Q.* Would your company have sought to condemn this ground, except for the purpose of transporting freights to and from the steel-works? *A.* I think not; it is just in this way: If the steel-works hadn't been there, we should not have thought of building this road to it; just as the main line of the road would not have been built to Wheeling if there had been no Wheeling,—the road being built in both cases to secure business. *Q.* When you said that your road 'is liable at any time to be shut out from either railroad,' didn't you mean to be shut out from access to the Wheeling Steel Works? *A.* Yes, sir." On cross-examination this question was asked the witness: "Is this averment in the amended petition true: 'The branch railroad and lateral work to be constructed by your petitioner is to be a public highway, and free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law, and is to be for public use?' *A.* That is my understanding." Being asked on the redirect, "Are the switches you have spoken of as fully a mile above Benwood, and close to Boggs' run, within the corporation limits of the town of Benwood? *A.* I think not. *Q.* What complaints, if any, have you ever known of from the citizens of Benwood, about there being no convenient place to deliver freight on your road consigned to that town? *A.* No special complaints have come to my knowledge."

J. M. Belville, the agent of the Pittsburg, Wheeling & Kentucky R. at Wheeling, after testifying, on cross-examination, as to the difficulty of his road getting freights to and from the Wheeling Steel Works, in answer to the question, "Of what use would your company's proposed lateral road be to the general business of the town of Benwood?" said: "It would enable the citizens there to load and unload cars of freight consigned to or coming from them. Question: What reason is there to suppose it would be of use in that way? Answer: We have several times had carload shipments to and from parties in Benwood other than the Wheeling Steel Works and the Benwood Iron Works, and they could use such a track for that purpose. Our business in Benwood outside of the iron business has increased very much, and the citizens there are demanding better facilities. *Q.* What facilities have you now for handling carload shipments in the general commercial business of Benwood? *A.* We have none except a siding on ground belonging to the Benwood Iron Works and cars for other parties can only be handled on that track through courtesy. *Q.* What effect has the want of such facilities had upon the business of your com-

pany in Benwood? A. I think it has directed business to the B. & O. road which we would otherwise have secured." On the redirect: "Q. On Exhibit A, now show you, is not the Benwood Iron Works' track you have spoken of indicated by the words, 'Siding used by Benwood Iron Works' and by red lines? A. Yes, sir. Q. Could not a track which would accommodate the carload trade with Benwood be put on the northerly side of that used by the Benwood Iron Works? A. We could not put in any such siding, for the reason that we have no property at that point available. Q. Suppose you had the property condemned: how would it be then? A. I suppose it would be practicable. I am not enough of an engineer to say positively. Q. Isn't it level ground there? A. The ground is level from a point about sixty feet east of our present main track, and running eastwardly from that."

Alonzo Loring has been secretary of the Benwood Iron Works for over 23 years, and in his deposition says the Pittsburgh, Wheeling & Kentucky R. Co. have not, to his knowledge, had a freight agent at Benwood. The business of the Benwood Iron Works with that company is done in the Wheeling office.

Now, what does this evidence amount to? I think, after all has been said, it amounts to this, and nothing more: that the

**Taking land
for switch as a
public use—
Authorities.**

lands sought to be condemned, and the purpose for which they are to be used if condemned, is to run a track or tracks over to connect with the steel-works; said switch, branch road, or lateral work is to be constructed for the purpose of transporting freights to and from said steel-works over petitioner's road. If this is a public use, then the lands should be taken; but if not they should not be taken for such purpose. It is insisted, by counsel for defendants in error, that such use is public; and he cites, to sustain the position, *Clarke v. Blackmar*, 47 N. Y. 150; *Dietrich v. Murdock*, 42 Mo. 284; *Lower v. Railroad Co.*, 59 Iowa, 563; *Dock Co. v. Garrity*, 115 Ill. 166; *Truesdale v. Sugar Co.*, 101 Ill. 561; *Mills v. Parlin*, 106 Ill. 60; *Hays v. Risher*, 32 Pa. St. 169; *Railroad Co. v. Railroad Co.*, 32 N. J. Eq. 765; *Coal Co. v. Coal Co.*, 37 Md. 562.

In *Clarke v. Blackmar*, the court said: "The counsel for the appellant insists that the common council had no power to authorize the streets of the city to be crossed by a railroad track for the benefit of private property or its owners. Be that as it may, it is not this case. The case shows that a very considerable business as common carriers, for a great number of persons, is carried on over this road, both by the Grand Trunk and New York Central The track is not private, but must be regarded as a branch track of the New York Central and Grand

Trunk; and the fact that the elevator, in the transaction of its extensive business, is greatly benefited, or that its owners contributed largely to the expense of laying the tracks, does not show it to be private." There is nothing in this case to show that the use was a merely private one.

In *Dietrich v. Murdock*, 42 Mo. 284, it was held that, "Where the legislature, in the exercise of its discretion, delegated to a railroad company the right of eminent domain, the courts ought not to interfere, except in those cases where it is manifest that private interests alone are to be promoted, and private rights violated to the extent of taking the property of one individual and transferring it to another. If by the terms of this charter it was made a public corporation for the use and benefit of that particular section of the state where it was located, and was obliged to furnish the means of transportation, both for passengers and freight, commensurate with its wants, it must be assumed that the grant of authority to the company to condemn the land necessary for its roadbed was a rightful exercise of legislative discretion."

In *Lower v. Railroad Co.*, it appeared that the company proposed to build a lateral line 15 miles long. There seems to be no doubt in this case, and no question, that the use for which the land was sought to be condemned was a public use. In *Dock Co. v. Garrity*, 115 Ill. 155, bills were filed to enjoin the laying of railway tracks in Illinois street, in the city of Chicago. Answers were filed, and the cause was referred to a master to take and report the evidence. The master reported the evidence, and the court enjoined the defendant as prayed. Appeals were prosecuted from these decrees to the appellate court for the First district, where they were affirmed. On appeal to the supreme court, the decree was reversed. The court held that railroad tracks laid on streets of a city, connected with existing railroads and extending to public warehouses, malt-houses, or manufacturing establishments, or to public wharves and landings, are, in their nature, public, and for the public good; and all railroad companies are required by law to permit such connections to be made with their tracks. Mr. Justice Scholfeld, in delivering the opinion of the court, said: "It is not claimed that the use of the streets can be permanently granted for private purposes; and we recognize as unquestionable law that the use of the streets, whether for vehicles drawn by animals, for those riding upon animals, for footmen, or for the passage of railway cars, must be for the public, and that no corporation or individual can acquire an exclusive right to their use, or the use of any part of them, for private purposes. But we have held that there may be a grant to private individuals of the right to lay tracks in the streets connecting with public railway tracks previously laid, and extend-

ing to the manufacturing establishments of those laying the tracks; but in such cases the tracks so laid become, in legal contemplation, to all intents and effects, tracks of the railway with which they are connected, and open to the public use, and subject to the public control in all respects as other railway tracks open to public use. We have not regarded the circumstances that they were laid with private funds, and that they terminated opposite or within convenient contiguity of a private manufacturing establishment, as materially affecting them, and giving a private character to their use. All *termini* of tracks and switches are more or less beneficial to private parties; but the public character of the use of the tracks is never affected by this. If they are open to the public use indiscriminately, and under the public control to the extent that railroad tracks generally are, they are tracks for public use. It may be in such cases that it is expected, or even that it is intended, that such tracks will be used almost entirely by the manufacturing establishment; yet if there is no exclusion of an equal right of use by others, and this singleness of use is simply the result of location and convenience of access, it cannot affect the question. *Truesdale v. Sugar Co.*, 191 Ill. 561; *Mills v. Parlin*, 106 Ill. 60."

It is true, as stated in the brief of counsel for defendant in error, that "In Pennsylvania, the acts known as 'lateral railroad acts,' which authorize the owners of mills and coal-

Pennsylvania cases. mines to condemn land necessary for the construction of lateral railroads from their mills or mines to a railroad or other line of public transportation, have always been held constitutional in Pennsylvania. This ruling was originally put by Chief Justice Gibson on the ground that the constitution of Pennsylvania did not expressly forbid the taking of private property for private use." Gibson, C. J., in the first case that arose on the subject (*Harvey v. Thomas*, 10 Watts, 63), said: "The most material point in the cause is that which involves the constitutionality of the statute on which the defendant's right is founded, but it is one about which little need be said. If there is an appearance of solidity in any part of the argument, it is that the legislature have not power to authorize an application of another's property to a private purpose, even on compensation made, because there is no express constitutional affirmance of such a power. But who can point out an express constitutional disaffirmance of it? The clause by which it is declared that no man's property shall be taken or applied to public use without the consent of his representatives, and without just compensation made, is a disabling, not an enabling, one; and the right would have existed in full force without it. Whether the power was only partially restrained for a reason similar to that which induced an ancient lawgiver to annex no

penalty to parricide, or whether it was thought there would be no temptation to the act of taking the property of an individual for another's use, it seems clear that there is nothing in the constitution to prevent it, and the practice of the legislature has been in accordance with the principle of which the application of another's ground to the purpose of a private way is a pregnant proof. It is true that the title of the owner is not divested by it, but, in the language of the constitution, the ground is nevertheless 'applied' to private use. It is also true that it has usually, perhaps always, been so applied on compensation made; but this has been done from a sense of justice, and not of constitutional obligation. But, as in the case of the statute for compromising the dispute with the Connecticut claimants, under which the property of one man was taken from him and given to another for the sake of peace, the end to be attained by this lateral railroad law is the public prosperity. Pennsylvania has an incalculable interest in her coal-mines, nor will it be alleged that the incorporation of railroad companies for the development of her resources in this or any other particular would not be a measure of public utility; and it surely will not be imagined that a privilege constitutionally given to an artificial person would be less constitutionally given to a natural one." In that case it appears that on the 5th day of March, 1832, an act of assembly was passed authorizing the location and construction of lateral railroads connecting with the public improvements, and prescribing the mode of obtaining the same. In pursuance thereof, the defendant, Freeman Thomas, petitioned the court of common pleas for the appointment of viewers to ascertain the amount of damage Jameson Harvey would sustain by reason of the railroad which he proposed to make through his land. He made the road, and the supreme court said he had a right to do so, although he thereby took private property for private use.

In *Hays v. Risher*, 32 Pa. St., *supra*, it was held that the lateral railroad acts are constitutional. In that case, Risher located a railroad, 20 feet wide, from his "lands, mill, coal-mines," etc., "lying within three miles of the Monongahela river, over the intervening lands of James H. Hays, to the Monongahela slack-water navigation." On writ of error, Woodward, J., for the court, said: "The truth is, when a lateral railroad is laid upon intervening lands, private property is not taken for private use; and there was no occasion for Judge Gibson's remark in *Harvey v. Thomas*, 10 Watts, 63, that the constitution does not forbid such taking. The private property is taken for public use—for clear and definite objects of a public nature, which are of sufficient importance to attract the sanction of the sovereign. That an individual expects to gain thereby, and has private motives

for risking the whole of the necessary investment, and acquires peculiar rights in the work, detracts not a whit from the public aspects of it. . . . It was found, as her public improvements penetrated the interior, that many productive mines and manufactories situated near them were still separated by the land of an unneighborly owner, which must be crossed or tonnage be lost to the public improvements. To compel such owners to admit a right of passage was not to take away from them a fair participation in the public improvements; and to compensate them for the land occupied was to do all they had a right to claim. They hold their land, as every man does, subject to the call of the government." *Harvey v. Lloyd*, 3 Pa. St. 331; *Schoenberger v. Mulhollan*, 8 Pa. St. 134.

In the case cited from 32 N. J. Eq. 765, Dixon, J., said: "But it is insisted by the complainants that the road which the National Docks R. Co. intends to construct will be a private, and not a public, one; and to establish this they adduce the purposes of the corporators. But I think these purposes are foreign to the inquiry. The character of the road in this respect is dependent, not on the designs of its projectors, but on the terms of the law which governs it. Said Judge Baldwin, in *Bonaparte v. Railroad Co.*, Baldw. 205: "A road or canal constructed by the public or a corporation is a public highway for the public benefit if the public have a right of passage thereon by paying a reasonable, stipulated, uniform toll." Tested by this criterion, and it is the true one, there can be no doubt that every railroad built by a corporation organized under our general law becomes *ipso facto* a public road."

In *Coal Co. v. Coal Co.*, 37 Md., *supra*, it appeared that, by the act governing the case, it was declared that the three persons named therein, and such other persons as might be associated with them in the manner therein provided, should be and were thereby incorporated and made a body politic by the name and style, etc.; "and the said company shall have all the privileges and rights necessary for carrying on the mining of coal and ores, and the manufacture of iron and fire-brick, and for transporting to market the produce of their mines, land, and manufactories, and shall have power to lease or purchase lands, mines, and furnaces, with their appurtenances, and to hold all such property, personal, real, and mixed, as they may require for the purposes aforesaid," etc.; and it was by statute also invested "with all and singular the rights, profits, powers, authorities, immunities, and advantages for the surveying, locating, and constructing a railroad, with the necessary appurtenances, from their mines or works, to connect with any convenient point or points, with other existing railroads in Allegany county, or with the Chesapeake & Ohio canal at Cumberland," in the same

manner as has been given and delegated to the Baltimore & Ohio R. Co., which includes the full and ample power of condemnation for right of way. By the same section it is made the duty of the company to "carry all persons and property at the same rates of tolls and prices of transportation as the Baltimore & Ohio R. Co. are or shall be by law allowed to charge and receive." On appeal; Alvey, J., for the court, said: "Without the facility of transportation from the mines by railroads, there would be little or no inducement to the investment of capital, and but small progress could be made in developing the vast mineral wealth of the state, in which the public at large are interested. To furnish the requisite facilities for the construction of railroads for the successful operation of the mines is therefore in some sense a public necessity, and, that being so, the use of the ways for such roads may well be said to be public, and therefore the right of condemnation exists; that the right should be placed in the hands and under the control of a private corporation, detracts nothing from the public nature of the use."

In Getz's Appeal (supreme court of Pennsylvania), 3 Am. & Eng. R. R. Cas. 186, it was held that the grant to construct a railroad carries with it, by necessary implication, the right to construct all works and appendages usual in the convenient operation of a railroad; that sidings are among such works. It was further held that the Philadelphia & Reading R. Co., by virtue of the general railroad law, is authorized to construct sidings leading to manufacturing or mining establishments held by private owners, and for this purpose may take, by virtue of the delegated power of eminent domain in it reposed, the interjacent lands belonging to other parties; that the right of running sidings to such private establishments, and of taking the necessary lands for the purpose, is clearly within the constitutional power of the legislature to confer, because the public interest is thereby subserved by reason of the increased facilities afforded for developing the resources of the state and promoting the general wealth and prosperity of the community. Trunkey, J., dissented.

In *Reeves v. Treasurer*, 8 Ohio St. 333, it was held that "The act of May 1, 1854, 'authorizing the trustees of townships to establish water-courses,' etc., and the amendatory act of April 14, 1857, are in contravention of the nineteenth section of the bill of rights, inasmuch as they authorize an appropriation of private property without reference to the public welfare." It has been held in New York that the use of lands for rural cemetery associations is private, not public; and that the provision of the New York statute authorizing the taking of lands for purposes of such associations, by proceedings *in invitum*, is constitutional

and void, reversing the same case in 5 Hun, 482; *In re Association*, 66 N. Y. 569.

In *Gilmer v. Lime Point*, 18 Cal. 229, "public use" is defined to be "a use which concerns the whole community, as distinguished from a particular individual." But it is not necessary that each and every individual member of society should have the same degree of interest in this use, or be personally or directly affected by it, in order to make it public. If the use for which the property is taken be to satisfy a great public want or public exigency, it is a public use in the meaning of the constitution. This court has said that, to authorize the exercise of the right of eminent domain, the use which the public is to have of such property must be fixed and definite. The general public must have a right to a certain definite use of the private property on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner, and transferring its title and control to another or to a corporation, to be used by such other or by such corporation as its private property, uncontrolled by law as to its use. Such supposed indirect advantage to the community is not, in contemplation of law, a public use. This use of the property, which in such case the public must have, must be a substantially beneficial use, which is obviously needful for the public to have, and which it could not do without, except by suffering great loss or inconvenience. *Varner v. Martin*, 21 W. Va. 534.

Section 44, c. 43, Code 1868, authorized any one owning timber or mineral land, and who deserves a subterranean or surface right of way by railroad or otherwise, under or through or over the land of another, for the purpose of mining for minerals, or conveying such timber or minerals to market, etc., to apply to the circuit court for condemnation proceedings. By the forty-fifth section, the report of the commissioner should not be confirmed, "unless from such report, and the evidence in the case, the court was of the opinion that the purpose for which the property was to be taken was of public utility," etc. Under this chapter the Valley Salt Co. filed its application to have condemned a subterranean right of way for a railroad under the lands of Maj. Brown and others. The circuit court condemned the way, and the defendants obtained a writ of error. The judgment was reversed, and the proceedings dismissed. Judge Paull, for the court, after reviewing the evidence, said: "No sufficient public use is therefore made to appear to justify an interference with the rights of private property. To secure the possession and enjoyment of private property is one of the chief ends of all free governments, and hence the limitation found in our national

and state constitutions to secure this object, and the safeguard thus provided in the supreme law, may not be lightly or recklessly invaded." *Salt Co. v. Brown*, 7 W. Va. 191.

In the case *In re Railroad Co.*, 33 Am. & Eng. R. R. Cas. 99, the court of appeals of New York held that a railroad which does not connect with a highway, which can only be reached by passing over state or private lands, which can have no habitations along or any freight traffic over the road, whose sole business is to convey sightseers along the Niagara river, and the season of whose operations is confined to four months in the year, is not such a railroad corporation as is contemplated by the general railroad act of 1850, and there is no such public use as to justify the exercise of eminent domain in its behalf. In its opinion, the court quotes with approbation *Cooley Const. Lim.* 669: "That can only be considered such (public use) when the government is supplying its own needs, or is furnishing facilities for its citizens in regard to these matters of public necessity which on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them otherwise, it is alike proper, useful, and needful for the public to provide." The court further says: "The fact that the road of the petitioner may enable the portion of the public who visit Niagara Falls more easily or more fully to gratify their curiosity, or that that the road will be public in the sense that all who desire will be entitled to be carried upon it, is not sufficient, we think, in view of the other necessary limitations, to make the enterprise a public one, so as to justify condemnation proceedings."

In *Coal Co. v. Railroad Co.*, 34 Fed. Rep. 386, 33 Am. & Eng. R. R. Cas. 104, note (decided March 26, 1888), it was held that "the constitution of Colorado. art. 15, § 4, declaring all railroads to be public highways, does not prevent the raising of the question as to the character of a railroad in a proceeding by it to condemn land. Article 2, § 15, providing that, 'whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.' . . . The inquiry is not as to what the company was organized for, or whether it will be a private or public corporation, but what the road will be, the structure itself, if any such thing will be made." The court further said: "It may be that this provision of the constitution was inserted with a view to remove the presumption which is here referred to, or perhaps to allay all doubts which might arise at any time in respect to the question; but it is certainly true that the provision of the constitution is only a declaration of the law as it stood at the time the constitution

was made." Hallett, J., refers in his opinion to a case I have not seen decided in his court (*McPhee et al. v. Union Pac. Ry. Co.*, not reported), in which it was held that a track which the company proposed to lay down in a town was only a private road for serving certain warehouses, not of a public character, which would enable them to proceed in opposition to the demands of certain property holders in the neighborhood.

In *Railroad Co. v. Wiltse*, 16 Ill. 449; s. c., 24 Am. & Eng. R. R. Cas. 261 (decided by the supreme court of Illinois in 1886), it was held that where the track for which the appellant sought to condemn appellee's land was a branch-road, intended for the private use of handling the freight of certain brick-works, the condemnation of the property for such a use is unauthorized by law, and the proceedings should have been dismissed as soon as such purpose became apparent. Shope, J., for the court said: "It is evident from the evidence in this case that the sole use and purpose of the proposed track was to reach the brick-works, situated between a half and three-quarters of a mile from appellant's railroad, and thereby create a feeder to its main line, and add to the volume of its freights. There is no pretense that there was any necessity for any increased facilities in the locality of the proposed track, except for the purpose of saving the hauling of brick from these brick-works, and the increased traffic brought to appellant's main line by the building of this spur. True, the superintendent says the track could be used to store cars upon; but it is in the country, and there is no pretence that there is or will be any necessity for or that it will be convenient to store cars at this point, or that the track was intended for such use. Besides, the track is shown to be designed for use by running cars over it each day. Indeed, so patent is it from the record that the proposed track was a spur road, intended for the use indicated, that the only statement by appellant's counsel, in his brief, of the use for which appellee's land was to be appropriated, is as follows: 'The appellee being the owner of some land located between the railroad and the brick-works, appellant filed his petition to condemn a strip thirty feet in width across his land, in order to build a railroad track from its main track to the brick-works, as described.' . . . If this was a side track, and was in some way necessary to or aided in the convenient and successful operation of appellant's railroad, the fact that it serves the private use mentioned would not, as said by the court in *Railroad Co. v. Dix*, 109 Ill. 237, make it any the less necessary as a side track; but there is no such pretense here, and the right to condemn appellee's land depends upon the right of appellant to build an independent branch-road from its main line to the brick-works, for the purpose of creating a feeder to its main line of road, or, as put by counsel, to move this vast volume of

freight. In no just sense can this proposed line be said to be connected with or necessary to the building, operating, or running of appellant's railroad."

In Getz's Appeal, *supra*, Trunkey, J., in a vigorous dissenting opinion, said, (3 Amer. & Eng. R. R. Cas. 195): "No one denies that a railroad company may lay as many sidings and turnouts as are fairly requisite to accommodate its business, nor that the company is intrusted with the location of its road and branches, keeping within the limits of its charter. Locating its road between certain points, or locating a branch to a certain point for accommodation of the public, is altogether different from locating a branch or siding merely to accommodate a private person; natural or artificial, for private gain. Here is a naked fact of running a siding, as it is called, across the plaintiffs' lot, against their will, for private gain, to a rolling-mill. This siding is not for public use. Its terminus is on private property. If the defendant may lawfully construct it, it may arbitrarily run its sidings to every private place it chooses, doing irreparable mischief to owners of property who are in the way. In Reading, the plaintiffs' dwelling and business are destroyed to-day in laying a siding to an iron-mill; to-morrow another citizen may be ruined by a siding to an ice-house; another, by one to a tannery; and so on indefinitely. Other companies have like powers as this defendant. In Philadelphia, dwellings may be demolished in running sidings to sugar refineries, shoe factories, shops, and sales-rooms, and other private places, at the arbitrary discretion of the several boards of directors. Outside of the cities, no man's farm will be secure from a siding to any stone-quarry or other private place whose owner may be favored by the judgment of a board of directors. I am not convinced that it was the legislature's intent to grant such rights, and do not believe they have been granted. But if within the words of the statutes or charters, it seems to me a gross violation of the citizen's right that his private property should be violently taken for private use."

Thus we see the progress that has been made in Pennsylvania in favor of the extraordinary rights claimed by corporations and persons against the private right of the citizen. First the legislative grant was justified in *Harvey v. Thomas*, *supra*, on the ground that the constitution did not forbid it; and since, on the ground that the use was public, although it is difficult to see where the general public could be interested. It would seem that the public would be quite as much interested in the issue of bonds to aid manufacturing companies, yet it is uniformly held that a statute which authorizes a town to issue its bonds in aid of the manufacturing enterprises of individuals is void because the taxes necessary to pay the bonds would, if collected, be a transfer of

the property of individuals to aid in the projects of gain and profits of others, and not for a public use, in the proper sense of that term. *Association v. Topeka*, 20 Wall. 656; *Cole v. La Grange*, 113 U. S. 1; *Iron-Works v. Town of Moundsville*, 11 W. Va. 1.

The property of railroad corporations, in so far as concerns the ownership thereof, and the profit or gain be made from their use, is to all intents and purposes private property, although applied to a use in which the public have an interest. *Railroad Co. v. Railroad Co.*, 97 Ill. 506. As far as the public is concerned, when what they need is for "public use," they have a right to invoke the exercise of eminent domain; but in so far as that which concerns them, as to their private interests, their profits and gains, are concerned, they stand as individuals, or as merely private corporations, in which the public has no concern, and for such private purposes cannot call into exercise the power of eminent domain.

Stripped of all the disguises thrown around the case of the petitioner, it is shown that its object is to condemn the land of the defendants for the purpose of enabling it to lay a siding, switch, branch-road, or lateral work from the main track to the

Conclusions—
Use not public.

Wheeling Steel-Works, a few hundred feet distant, for the purpose, as stated in the original petition, "of transporting freights to and from said steel works over the petitioner's said railroad." This clearly was for the private accommodation of both the railroad and steel works, and to make the private business of both more profitable. This was not for a public, but was for a private use, and the taking of the property, under these circumstances, would be the taking of private property for private use, which is clearly prohibited. The learned counsel for defendant in error in his brief says: "No deadlier blow could be aimed at the industries of the state than that which this defendant asks the court to deal." It seems to us, if railroad corporations were permitted, *ad libitum*, to do what this defendant in error asks to be done, "no deadlier blow could be dealt the private rights of the citizen." If the doctrine claimed by defendant in error should prevail, then corporations might go to any private place they chose, to rolling-mills, ice-houses, tanneries, sugar refineries, brick-yards, grocery stores, etc., and in the country, to stone quarries, coal mines, stock farms, etc., and, if any private citizen dared to stand in the way, violently wrest his property from him for their mere private gain. In such a state of affairs the so-called protection by the constitution to the rights of private property, by the arbitrary ruling of the courts, would be rendered nugatory and void. The mere declaration in a petition that the property is to be appropriated to public use does not make it so, and evidence

that the public will have a right to use it amounts to nothing in the face of the fact that the only incentive to ask for the condemnation was private gain, and it was apparent that the general public had no interest in it. We would do nothing to hinder the development of the state, nor to cripple railroad companies in assisting such development, but at the same time we must protect the property rights of the citizens. All that to which the corporations are entitled under a proper construction of the law they will receive; but they must not, for their own gain and profit, be permitted to take private property for private use. The judgment of the circuit court is reversed, and the petition dismissed.

GREEN, SNYDER, and WOODS, JJ., concurred.

Eminent Domain—Nature of Right—Public Use.—It has been held that where there is direct public benefit, it is not necessary in order to constitute a public use, that the improvement contemplated should be directly beneficial to the whole state, or if the people of a particular district contemplated are so benefited it is sufficient. See *Ross v. Davis*, 97 Ind. 79; *O'Reilly v. Draining Co.*, 32 Ind. 169; *Riche v. Bar Harbor Co.*, 75 Me. 91; *Talbot v. Hudson*, 82 Mass. (16 Gray), 417; *De Camp v. Hibernia R. Co.*, 47 N. J. L. (8 Vr.) 43; s. c., 24 Am. & Eng. R. R. Cas. 273; *Matter of Bloomfield & R. Gas Light Co.*, 63 Barb. (N. Y.) 437; *Chesbrough v. Com'rs.*, 37 Ohio St. 508.

What is such a public use as will justify the exercise of the power of eminent domain, is a question for the courts, except in those cases where the improvement is declared to be for a public use, by an act of the legislature, unless it manifestly appears by the provisions of such act, that such improvement will have no tendency to advance and promote public use. See *Bankhead v. Brown*, 25 Iowa, 540; also *Challiss v. Atchison & S. F. R. Co.*, 16 Kan. 117; *Hazen v. Essex Co.*, 56 Mass. (12 Cush.) 475; *Co. Comm'rs of St. Louis Co. v. Griswold*, 58 Mo. 175; *Giesy v. Cincinnati W. & Z. R. Co.*, 4 Ohio St. 308; *Smith v. Gould*, 61, Wis. 31; s. c., 2 Am. & Eng. Corp. Cas. 424.

Same—Railways—Branch Road.—A railway is in general such a public use as affords just ground for the taking of private property, and appropriating it to such use. See *Aldrich v. Tuscombia C. & D. R. Co.*, 2 Stew. & P. (Ala.) 129; s. c., 23 Am. Dec. 107; 4 Stew. & P. (Ala.) 421; *San Francisco A. & S. R. Co. v. Caldwell*, 31 Cal. 367; *Bradley v. New York & N. H. R. Co.*, 21 Conn. 294; *Whiteman v. Wilmington & S. R. Co.*, 2 Harr. (Del.) 514; s. c., 33 Am. Dec. 411; *Swan v. Williams*, 2 Mich. 427; *Weir v. St. Paul & T. R. Co.*, 18 Minn. 155; *Concord R. Co. v. Greely*, 17 N. H. 47; *Buffalo & New York R. Co. v. Brainard*, 9 N. Y. 100; *Secombe v. Milwaukee & St. P. R. Co.*, 90 U. S. (23 Wall.) 108; bk. 23, L. ed. 67; *Beekman v. Saratoga & S. R. Co.*, 3 Paige Ch. (N. Y.) 45; s. c., 22 Am. Dec. 679, and note; *Bloodgood v. Mohawk & H. R. Co.*, 14 Wend. (N. Y.) 52; s. c., 1 Wend. (N. Y.) 93; 1 Am. Dec. 313; *Louisville C. & C. R. Co. v. Chappell*, Rice (S. C.) L. 383; *Buffalo B. B. & C. R. Co. v. Ferris*, 26 Tex. 588; *Olcott v. Fond du Lac Co.*, 83 U. S. (16 Wall.) 78; bk. 21, L. ed. 382; *Bonaparte v. Camden & A. R. Co.*, 1 Baldw. C. C. 205; *Baltimore & O. R. Co. v. Vaness*, 4 Cr. C. C. 495.

Where railroads are constructed and operated under the authority of the state legislature, either by corporations or joint stock companies they

are to be deemed constructed and operated for the public use or benefit. See *Bradley v. N. Y. & H. R. Co.*, 21 Conn. 294; *Renesselaer & S. R. Co. v. Davis*, 43 N. Y. 142; *In re Kerr*, 42 Barb. (N. Y.) 121; *Beekman v. Saratoga & S. R. Co.*, 3 Paige Ch. (N. Y.) 45; *Bloodgood v. Mohawk & H. R. Co.*, 14 Wend. (N. Y.) 54; s. c., 18 Wend. (N. Y.) 17, 18; *Clark v. Rochester*, 5 Abb. (N. Y.) Pr. 124.

The manufacture of railroad cars is not a public use and necessarily connected with the management of the railroad company, so that it may condemn land therefor, or for a track leading thereto. See *Eldridge v. Smith*, 34 Vt. 484. But whether or not a railroad company may condemn lands for a side track is a question which is not yet settled; there being many cases in the affirmative and also in the negative. See as to the affirmative, *Sherman v. Buick*, 32 Cal. 241; *Brewer v. Bowman*, 9 Ga. 37; *Robinson v. Swope*, 12 Bush (Ky.) 21; *News Cent. Coal Co. v. Georgia Creek Coal Co.*, 37 Md. 537; *Geitz's Case*, 105 Pa. St. 547; s. c., 3 Am. & Eng. R. R. Cas. 186; *Cleveland C. & P. R. Co. v. Speer*, 56 Pa. St. 325; *Pittsburgh v. Pennsylvania R. Co.* 48 Pa. St. 359; *Pocopson v. Road*, 16 Pa. St. 15; *Harvey v. Thomas*, 10 Watts. (Pa.) 63; s. c., 36 Am. Dec. 141. Holding the contrary see *Bradley v. New York & N. H. R. Co.*, 21 Conn. 305; *Young v. McKenzie*, 3 Ga. 31; *South Chicago R. Co. v. Dix*, 109 Ill. 237; s. c., 17 Am. & Eng. R. R. Cas. 157; *Buffalo & N. Y. R. Co. v. Brainard*, 9 N. Y. 100; *Taylor v. Porter*, 4 Hill, (N. Y.) 140; s. c., 40 Am. Dec. 274; *Reeves v. Treasurer of Wood Co.*, 8 Ohio St. 333.

In *Rochester & N. H. R. Co. v. Babcock*, 110 N. Y. 119. A railroad company filed its map and profile for a right of way, and served notice thereof on an owner of land over which it passed. Soon thereafter the owner leased the right of way on the premises sought to be taken by the railroad company to another railroad company, upon which to lay a switch leading to a brick-yard, and the construction of the switch was immediately begun. The switch was not needed for the general purposes of the leasing company, nor was it ever completed as far as the brick-yard. *Held*, that the occupation of the premises under the lease was not for such a public use as would bar condemnation by the former railroad company.

The court say "Lands held by a corporation, but not used for or necessary to a public purpose, but simply as a proprietor, and for any private purpose to which they may be lawfully applied, may be taken as if held by an individual owner. *In re Commissioners*, 66 N. Y. 418. The need of the land sought in aid of collateral enterprises remotely connected with the running or operating of the road will not justify an assertion of the right of eminent domain. *Railroad Co. v. Davis*, 43 N. Y. 146. The whole subject has been recently and fully discussed, *In re Railway Co.* 108 N. Y. 375; 33 Am. & Eng. R. R. Cas. 99, and the limits of judicial control defined. In the case at bar the lease taken was brief and temporary; the lessor a complaining land-owner, and the lessee watching a competitor; the building of the switch so swift and prompt as to indicate a design of obstruction; the purpose asserted, that of convenience to the owners of a brick-yard, in which no public use was involved; even that purpose inchoate and barred by the refusal of Mrs. Emery, and the brick-yard not even reached, the switch needless for the general purposes of the company, and no such expected use asserted; and the occupation for private gain, and for individual convenience. A switch may be needed for the storage of cars, or making up of trains, or for access to docks, warehouses, and elevators open to public use, and resulting in public accommodation; but nothing of the kind is here pretended, and it is even doubtful whether its sole utility to the builders was anything other than as an obstruction."

TOLEDO, SAGINAW & MACKINAW R. Co.

v.

EAST SAGINAW & ST. CLAIR R. Co. *et al.*

(*Michigan Supreme Court, Nov. 1, 1888.*)

Eminent Domain—Railroads—Crossing Other Roads—Petition.—An averment in a petition of a railroad company to condemn a crossing desired to be made of another railroad, which states that it is necessary for public use to take for use of petitioners the property described therein, is a sufficient averment on that subject.

Same—Petition—Sufficiency.—A petition of a railroad company to take the lands of another company for crossing purposes, which states that the petitioning company has decided that the property in question is necessary to accommodate the tracks proposed and to develop business along its line is sufficient on that subject.

Same—Procedure—Commissioners to Condemn, Where Not Refused.—On petition to condemn lands of a railroad company for crossing purposes, where the statutory requisites appear, and are substantiated before the court, the appointment of commissioners to condemn the land will not be refused because more is stated in the petition than the statute requires.

Same—Plat of Road—Crossing Board—Jurisdiction.—Where the terminal branches of a railroad are designated, surveyed and mapped with the main line, approved by a majority of the directors, and certified as essential to the development of business along the line of the road, it is sufficient to give the state crossing board jurisdiction.

Same—Condemnation Proceedings—Dismissal—Effect.—The discontinuance of condemnation proceedings as to one point of crossing does not affect action to be taken as to other points.

Same—Map and Survey—Right of Way of Other Roads—Condemnation.—When the map and survey have received the approval of the state crossing board and been duly filed, the rights of way of other roads may be condemned for crossings, as in the case of private property, whether the new road proceeds through the place to the terminal points by one or more terminal lines.

Same—Branch Road—When Necessary to Public Use.—Where the record shows that the construction of branches and spur tracks laid down on the map, is essential to any successful operation of the petitioner's road, it must be held to be necessary for public use.

CAMPBELL and MORSE, JJ., dissent.

APPEAL from circuit court, Saginaw county.

Petition of the Toledo, Saginaw & Mackinaw R. Co. against the East Saginaw & St. Clair R. Co. and the Flint & Pere Marquette R. Co. for the appointment of commissioners to condemn a crossing desired to be made by petitioner over respondents' road. Commissioners appointed, report made and sustained, and respondents appeal. How. St. Mich. § 3332, provides that a petition for the appointment of commissioners shall state that

the company has surveyed the route of its proposed road, and made a map thereof. Further facts appear in the opinion.

Wm. L. Webber and Wisner & Draper for appellants.

John A. Edget for appellee.

SHERWOOD, C. J.—The petitioner in this case is a railroad company, organized and incorporated under the general laws of this state, approved May 1, 1873. By the articles of association the company is authorized to construct and maintain its road from Durand, in the county of Shiawassee, through Saginaw, to Mackinaw City, in the county of Cheboygan; and it is averred in the petition that it is the *bona fide* intention of the company to construct the entire road between the places named, including all branch lines and spur tracks connected therewith in East Saginaw; that, for the purposes of construction, it has divided the distance between said places in two sections. The first, and the first intended to be constructed, extends from Durand to the Saginaw river, in the city of East Saginaw. The petitioner further avers that the company has surveyed the route of its proposed line of road from the south line of Saginaw county to the Saginaw river, in the city of East Saginaw, and have made a map and survey thereof, by which the route of said railroad, and of the several branches and spur tracks thereof in the city of East Saginaw, is designated; and that it has adopted said map and survey, and located its road, with branches and spur tracks, according thereto. That the northward track thus located crosses the East Saginaw & St. Clair R., near Maple street, in East Saginaw, and runs thence to the intersection of Brewster and Franklin streets, and thence along Franklin and Thompson streets to the Saginaw river, and is designated on the map as the petitioner's main line. That the more southerly branch of said road, by a curve of 4 degrees and 62 minutes, crosses Maple street, south of Euclid street, in said city; and from thence westerly, across Washington avenue, near Sidney street, where said proposed line of road again branches,—one track going in a south-westerly direction, crossing Curtis, Newton, Webber, Sherman, and Mackinaw streets, at its intersection with Clinton; thence across Eaton street to a point in King street, crossing the East Saginaw & St. Clair R. at the intersection of Saginaw and King streets; and thence along King street to its southerly terminus of the same, crossing the several spurs of King-Street track of the East Saginaw & St. Clair R., which leads therefrom to the mills and manufactories situate on the westerly side thereof,—and is designated as the "King-Street Branch" of petitioner's road. That a second track from the point of divergence, near Washington avenue and Sidney street, runs on a curve to the northwest, crosses the track

of the East Saginaw & St. Clair R. near the end of the Emerson bayou, and running to the westerly bank of the same, and from thence north-easterly, along said bayou, to the terminus on the "Middle Ground," so called, situated between the Saginaw river and Emerson bayou; this track being designated as the "Middle-Ground Branch" of petitioner's road. That the company has decided that, in order to develop the business along the line of its road, it is expedient to build and finish the branch line above described at the same time and as fast as the main line. And it further avers that the building of the branches is necessary to obtain a location upon the river front on Saginaw river, and to accommodate the business and shipping interests of the city on said river. That the map and survey shows the particular crossings to be made as selected, and of the tracks of other roads with petitioner's main, branch, and spur tracks, and that such map has been approved by the state board, after notice to parties interested, and a full hearing of the matter before them, including the branches and spur tracks; and such approval is indorsed on the same, and has been filed with the proper certificate of the directors, indorsed thereon, that the company has located the road, according to said map and survey, with the register of deeds at Saginaw county. The petitioner further shows that the state crossing board has determined the grade for said crossings of petitioner's roads, branches, and spurs, and has designated the switches and kind of frogs to be used at such crossings, and in what manner the expense is to be borne in making and maintaining such crossings; and has determined the stop of trains to be made before making a crossing of the road when completed, and what precautions shall be taken, and at whose expense be maintained, to prevent accidents at such crossings. The petitioner further alleges that it has obtained the consent of the common council of East Saginaw to lay its track in King street. Petitioner further shows that it desires to cross with its road and branches and spur tracks the defendants' roads and spurs, and to acquire the right to do so; and petitioner further alleges "that it is necessary, for the purpose of constructing, building, and operating the King street branch of its said railroad, to cross at grade, and at an angle of 14 deg. to the center line thereof, the main tracks of the East Saginaw & St. Clair road, at the intersection of King and Saginaw streets, and also to cross at such angle, to the center line thereof, as their bearing course shall require, the several spur tracks, leading westwardly on King street from said main tracks, at the place and in the manner specified in the said order of the state board hereinbefore recited,—all substantially as shown in the map hereto annexed, and made part of this petition. And to that end, to acquire the right and privilege to make use of that part

of said King street occupied by the tracks of the East Saginaw & St. Clair R., for the purpose of constructing and operating your petitioner's said railroad across the main and spur tracks and right of way of said East Saginaw and St. Clair R., in said street, at the point designated in your petitioner's said map as the points of intersection or crossing said main and spur tracks; also the right to cut the rail of the said main track and spurs at the several points of intersection of your petitioner's proposed road therewith, and to insert therein suitable crossing frogs at the grade thereof, and to erect and maintain the safety gates at the several spur crossings, in the manner required by the said order of the state board; together with the right to pass and repass your petitioner's trains of cars on and over said main track and spurs. And your petitioner avers that the taking of said right, privileges, easement, and property in and over said East Saginaw & St. Clair R., and its said spur tracks, to the extent, in the manner, and for the purpose so stated, is necessary for the public use. Your petitioner further shows that it desires to acquire the right to cross, with the Middle-Ground branch of its said railroad, the said East Saginaw & St. Clair R., at grade, at the point and angle designated for such crossing in said map hereto attached, and made part of this petition." Petitioner then gives a particular description of the lands required for the right of way and crossing, and the particular interests it seeks to obtain therein for such use; and petitioner expressly avers that the taking of said land, and the privileges asked for therein, is necessary for public use, and to the extent stated. That the East Saginaw & St. Clair R. Co. has its offices in East Saginaw, and is the owner of the East Saginaw & St. Clair R. That the Flint & Pere Marquette R. Co. is in possession of and operating said East Saginaw & St. Clair R. Co., and is the lessee thereof. That petitioner has been unable to agree with the owners of and parties interested in said premises, for the premises and rights it desires, and to cross the track and acquire the right of way over defendant's railroad in King street, or any of the several spurs diverging from the Spring street track, in manner and form as set out in the petition, or to acquire title thereto, or to the right of use in said premises described, for the purpose of crossing with its said Middle-Ground Branch R., because said defendants deny all legal right on the part of petitioner to take said premises for the purpose stated, and refuse to negotiate on any basis whatever. Petitioner prays for the appointment of commissioners to condemn the land; to determine the necessity for taking for public use for the Middle-Ground branch of petitioner's road; also the necessity for taking for public use the rights of crossing, with petitioner's King street branch of its railroad, the main track of the East Saginaw & St. Clair R.,

located in King street, and its several spur tracks, diverging westerly therefrom, together with the other rights and privileges incidental to such crossing; and to appraise and determine the damage and compensation to be allowed therefor to the owner thereof and the operating mortgagee.

The respondents appeared, each by its own attorneys, and made their joint answer to the petition, and give, among other reasons why the prayer of said petition should be denied, the following: "*First.* There has been no map filed in the office of the register of deeds of Saginaw county showing the line of road of said petitioner, and certified to by a majority of the directors of said company, over, across, or along the property sought to be acquired by said petition. *Second.* There has been no order made by the railroad-crossing board, mentioned in said petition, in any case where said board had jurisdiction; and the order to which said petition refers, so far as it relates to the property sought to be condemned in this proceeding, is utterly without force, and void, as having been made without any jurisdiction whatever. *Third.* And the said East Saginaw & St. Clair R. Co. avers that no notice was given to it by the said railroad-crossing board, nor was any hearing had at which it was represented concerning the approval of the map referred to in said petition. *Fourth.* It is not pretended that any part of the property sought to be taken by this proceeding is necessary for the construction of the petitioner's said railroad, the said track being alleged to be a spur, or branch; and these respondents deny that there is any power or right, under the general railroad law, to take property and rights by condemnation for private purposes, and aver that the purpose sought to be served by the taking of the rights specified is a private purpose. *Fifth.* And these respondents deny that the city of East Saginaw had anything to grant to the petitioner,—any rights whatever upon King street,—and aver that these respondents are in possession of said King street under the rights heretofore granted by the proper municipal authorities of the territory where the street is situated, and has constructed its spurs and branches, and is using the same now as a part of the main line of the said East Saginaw & St. Clair R., and that the use by the said East Saginaw & St. Clair R. is necessary for a public use, and that the territory sought to be taken by the said petitioner is territory which is now occupied by these respondents for a public purpose and public use, and deny the right of the petitioner to take property already subjected to a public use for their use. *Sixth.* These respondents deny that the petitioner has any right to proceed to condemn property or to build spurs or branches for the development of business, prior to the construction of the main line. *Seventh.* These respondents expressly aver that the order made

by the said railroad-crossing board, referred to in said petition, was utterly without jurisdiction, and that, in assuming to exercise powers legally conferred upon it the said board exceeded its jurisdiction; and that the order made by said board in the premises is absolutely null and void, for the reasons in that behalf hereinbefore given. *Eighth.* That the statute which authorizes the making of a survey of a line of road refers to a single line, and does not contemplate a system of branches and spurs radiating in various directions from said main line; and, as the rights and property sought to be acquired by this petition are not upon any part of the line or route of the road of said petitioner, the statute confers no authority to proceed before commissioners or a jury for condemnation. *Ninth.* The map upon which said board of railroad crossings assumed to act was a map which was approved only by the directors as a map of the main line of road; and nothing upon said map indicated an approval by the directors of any spurs or branches. *Tenth.* That the use which the petitioner seeks to make of the spur tracks and branches alluded to is a mere private use, for freight tracks only. That the petitioner has no expectation of using the same for passenger trains, but designs to treat them as yard-tracks, for the private purpose of receiving freight for transportation from private parties at less expense than to do so in the ordinary way of drayage. *Eleventh.* That the statute nowhere gives the petitioner the right to take the property and right of way of these respondents, except for the purpose of crossing with its main line of road, and no such crossing is sought by this petition. *Twelfth.* That the statute nowhere gives the petitioner the right to take the facilities and franchises which belong to the respondents upon King street, and convert them to its own use. *Thirteenth.* That the said petition is untrue and insufficient in its allegations to entitle the petitioner to any order for the appointment of commissioners; and these respondents pray that the same may be dismissed. *Fourteenth.* Respondents further state that the said petition does not properly describe the property and rights and franchises sought to be taken at the proposed crossing by its King-street branch of the said East Saginaw & St. Clair R., nor at the proposed crossings of the seven branch or spur tracks extending from said East Saginaw & St. Clair R., in King street; nor does it properly describe the property, rights, and franchises sought to be taken at the crossing by what is termed in the petition 'Middle-ground Branch,'—all said description being indefinite, uncertain, and insufficient. *Fifteenth.* Respondents further state that the said petition is not, in its allegations, in conformity with the statute in such case made and provided. *Sixteenth.* It is not competent in law to petition for more than

one crossing in one application, and this petition embraces nine crossings."

These several reasons were preceded by a denial of the truth of the averments of the petition. Testimony was taken before the court upon the hearing of complainant's petition, in which it appears that the defendants had notice of the hearing before the state railroad-crossing board in the matter of the approval of the map; that their representatives attended the meeting, and took part in the same, and raised no question as to want of sufficient and proper notice at that time. The evidence also tended to show that the rights of way for the petitioner's road had mostly been obtained from East Saginaw, south to within two and one-half miles of Durand, its southern terminus; that a contract for the entire line of road, including all branch lines and spur tracks, had been let, including the building of bridges, docks, terminal-points, and depots, and everything required to fit the road for operation; that 12 miles of the roadway was ready for the ties; and the said Middle-ground branch had been partly graded, down to the East Saginaw & St. Clair R. track and crossing. The testimony tends to show, further, that the "Middle-ground," so called, lies between Emerson's bayou and the Saginaw river, and is capable of being made navigable for vessels of all classes, and it is the design to construct, upon this place, docks, slips, and storehouses requisite for a water terminus; that the main line is largely to be furnished with its freight from this branch; that the traffic will be of a bulky nature, such as coal, stone, and wheat, coming to the main line; and going out on the main line will be lumber, lath, salt, shingles, and timber, and other forest products; and the main line will be greatly dependent at all times for its freight upon these branches and spur lines, for its business; and that all these bulky articles must go to the river front, and not to a central warehouse, to make the business of any profit, or successful, and there is no other location so eligible as this "Middle-ground" for the purpose mentioned; that by the action of the defendants in refusing to allow the crossing of the tracks, the contract for the completion will be greatly delayed, as the completion of the branches is of great assistance in bringing in material for the construction of the main line, the delay of which is a great damage to the public; that 96 per cent of the salt product of the Saginaw river, amounting to 18,000,000 barrels per year, is handled by the Michigan Salt Association; and that, of the 750,000,000 feet of lumber manufactured at the Saginaw mills, 250,000,000 feet in 1887 were shipped by rail, and that it is believed that, in 1888, 300,000,000 will be so shipped, and that it is impossible to dray to central stations such quantities for the purpose of shipment; that it can only be done by the use of spur lines to man-

ufactories where the articles are produced ; that the tonnage of the salt and lumber alone in the Saginaw valley exceeds the entire tonnage of the wheat crop of the two states of Wisconsin and Minnesota combined, and that a very great public interest will be subserved by the increase of transportation to be furnished by the construction of petitioner's road, with its branches and spurs ; that, in addition to the interest generally subserved by the proposed Middle-ground terminal, it is necessary to accommodate the mills and salt-manufactories and lumber-yards and the furniture companies, in removing their products. The circuit judge, upon such hearing, overruled all objections made by respondents, so far as they relate to the Middle-ground branch of petitioner's railroad, and appointed commissioners to ascertain and determine the necessity for taking for the public use the real estate, rights, and easements necessary for operating said branch, and to determine the compensation and damages of respondents which petitioner should pay therefor ; and the court further denied the application relating to the King-street branch, whereby it sought to enforce a crossing of the respondent's road at King street where it intersects Saginaw street, and to cross the seven spur tracks of respondent's road, leading westerly in King street from the main track. The order entered by Judge Gage in the matter will be found in the margin.¹

¹ The court finds that no sufficient cause has been shown against the granting of the prayer of the petition so far as relates to the appointment of commissioners to ascertain and determine the necessity for taking the property, rights, and easements alleged in the petition to be necessary for the building and operating of petitioner's railroad, described and designated in the petition as the "Middle-ground Branch," in manner and form therein recited ; and it is therefore ordered that all objections raised by respondents to said petition, so far as the same relate to said "Middle-ground Branch" of petitioner's proposed railroad, be and the same are hereby overruled ; and, respondents not demanding a jury, it is further ordered that Charles W. Grant, D. F. Rose, and D. A. Pettibone, three disinterested and competent freeholders of Saginaw county, be and they are hereby appointed commissioners, agreeable to the prayer of said petition, to ascertain and determine the necessity for taking for the public use the said real estate, rights, and easements alleged by petitioners to be necessary for the building and operating of the said "Middle-ground Branch" of its railroad ; and, in the event they determine that it is necessary to so take the same, to appraise and determine the compensation and damages to be allowed and paid therefor by petitioners to respondents,—all in manner and form as more fully set out in said petition, and reference to which is for greater certainty hereby made. And such commissioners are directed to first meet at the court-house in the city of Saginaw, on the 6th day of January, A.D. 1888, at 9 o'clock A.M., then and there to enter upon their duties under this appointment. The court further finds and determines that the application of the petitioner to acquire the right to cross with its "King-street Branch" railroad the main track of the East Saginaw & St. Clair R. at the intersection of King and Saginaw streets, and also to cross the several spur tracks, seven in number, leading west-

Commissioners were duly appointed in pursuance of the order made in the matter relating to the Middle-ground branch; and on the hearing before them, all the parties were represented, and testimony was taken upon both sides. But one witness, however, on each side was sworn. The commissioners viewed the premises, and, after hearing the testimony, determined "that it is necessary to take for the public use, to wit, at the head of 'Emerson Bayou,' so called, in the city of East Saginaw," the property, rights, and premises mentioned in the petition, sought to be condemned for the use of respondents' road; and assessed respondents' damages at the sum of \$150, which they awarded to respondents jointly.

To the confirmation of this report of the commissioners, the respondents appeared by their counsel, and made the following objections:

"*First.* There is no law authorizing the taking of the property and crossing of defendants' road for the purpose set forth, and as prayed for in said petition. *Second.* The appointment of said commissioners was against respondents' rights, and was without authority of law. *Third.* Under the evidence before the court, and the law of the land, the court had no authority to appoint said commissioners, and no right to act in the premises was conferred upon said commissioners by the order appointing them. *Fourth.* The evidence taken before the court upon the hearing of the petition for the appointment of commissioners

wardly in King street from the main track of said respondent company's railroad, in manner and form prayed by its petition, is to be regarded and treated as an entire and indivisible proceeding; that, under the proofs in the case, so much of King street, so-called, as lies south of the Ann Arbor Salt & Lumber Co.'s plat, and the north of the north line of the Derby addition to the city of East Saginaw, and within the limits of which five of the spur tracks of respondents' railroad sought to be crossed by petitioner are situate, has not been at any time lawfully laid out, and is not now a lawful public street in which the common council of the city of East Saginaw could grant petitioner right of way, but it is in part the private property of the respondent company; and that, as a result of this finding, it is ordered that the said application of the petitioners in this cause, so far as it relates to the "King-street Branch" of its proposed railroad, in manner and form as now presented by the petition, be and the same is hereby denied. But this finding and order is not intended and shall not be construed as passing upon or determining against the rights of petitioner to obtain the crossing of said respondents' main track at the intersection of King and Saginaw streets, or the two spur tracks next south of such intersection which lead westwardly from said main track, in that portion of King street north of the south line of said Ann Arbor Salt & Lumber Co.'s addition, nor to determine any right of either petitioner or respondents in said portion of King street last specified, nor in anywise to preclude the petitioner from at any time hereafter proceeding by petition in proper form to acquire such right in said street as it may lawfully be entitled to acquire therein.

C. H. GAGE, Circuit Judge.

did not show that the taking of the respondents' property was necessary for public use, but, on the contrary, the evidence affirmatively showed that such necessity did not exist. *Fifth.* The court having determined that, as to so much of said petition as referred to King street, the prayer for the appointment of commissioners must be denied; and, having so ordered, there was no authority for the appointment of commissioners upon what is called in the said petition the 'Bayou Branch,' and the court erred in appointing such commissioners, and they were without authority to act. *Sixth.* The evidence taken before said commissioners did not show that the taking of the property in question was necessary for the public use, but, on the contrary, showed that no necessity existed. *Seventh.* The evidence before the commissioners showed that no part of the line of petitioner's railroad was in operation or constructed, and no ties or iron had yet been laid upon any part of it.

"WM. L. WEBBER, Attorney for F. & P. M. R. Co.

"WISNER & DRAPER, Attorneys for E. S. & St. C. R. Co."

The report of the commissioners was duly confirmed by the circuit judge.

Respondents have taken their "appeal from the appraisal and report of the commissioners in this matter, and from the proceedings in said matter, and confirmation of said commissioners, and specify the following objections as grounds and reasons for appeal:"

"*First.* That the circuit court has no power or jurisdiction to appoint the commissioners in this matter. *Second.* That, under the evidence taken upon the hearing for the appointment of commissioners, the court was not authorized to make such appointment, and the order appointing the same was erroneous, and against the right of respondents. *Third.* That the circuit court was not authorized to appoint said commissioners, and erred in so doing; because it affirmatively appeared, upon the hearing of the petition for their appointment, that the taking of the respondents' property for crossing purposes was not necessary for the public use, and because it affirmatively appeared that the building of the spur track in question, and the taking of respondents' property for crossing purposes, had not been found necessary to develop business along the petitioner's line of road, and that no part of petitioner's railroad was in operation, nor had any ties or rails been laid upon any part of the same. *Fourth.* That the circuit court erred in appointing said commissioners, and that the order appointing the same was unauthorized, because: (a) there had been no order made by said railroad-crossing board, at any time, in this matter, where said board had jurisdiction; (b) the purpose of taking the rights sought to be taken by the petition was a private, not a public,

purpose; (c) that petitioner had no right to condemn property to build spurs, or branches, for the development of business, before it had any part of a main line constructed; (d) the order alleged in said petition to have been made by the railroad-crossing board was made before it had been found necessary to develop business along petitioner's line of road, that any spur track or branch should be constructed, and before the board of directors of petitioner had judged or determined that there existed such necessity, or that it was expedient to build any spur or branch. *Fifth.* The court having determined and ordered that the prayer of said petitioner, in so far as it related to the King-street branch, must be denied, there was no authority for the appointment of commissioners upon what is called in said petition the 'Middle-ground Branch.' The court erred in appointing said commissioners, and they were without authority to act. *Sixth.* The evidence taken before said commissioners did not show that the taking of the property in question was necessary for the public use, but, on the contrary, showed that no such necessity existed; and the finding of said commissioners in that behalf was arbitrary and unjustifiable, and against the rights of respondents. *Seventh.* The evidence taken before the commissioners showed that no part of the line of petitioner's railroad had been yet constructed, and no ties or iron had yet been laid upon any part of it. *Eighth.* That the court erred in confirming the report of said commissioners against the objections of respondents.

"Dated January 27, 1888.

W. L. WEBBER,

"Attorney for Flint & Père Marquette R. Co.;

"WISNER & DRAPER,

"Attorneys for East Saginaw & St. Clair R. Co."

We will now proceed to consider the grounds of objection in the order stated, as they include, substantially, all the objections made from the beginning of the proceedings. The first relates to the power and jurisdiction to appoint commissioners in this case. The power to appoint commissioners in such cases is conferred upon the court by statute (How. St. § 3332); but the jurisdiction or right to exercise that power depends upon the existence of certain facts, which must be made to appear by petition to the court empowered to make the appointment. It is claimed the petition in this case is defective; and the particulars in which it is claimed by relators to be insufficient are specifically pointed out in the next four grounds of objection to the confirmation of the report of the commissioners above set forth. The petitioner states that it is necessary for public use to take, for the use of petitioner's road, the property and rights described in the petition, to the extent and for the

Power and jurisdiction to appoint commissioners.

Sufficiency of petition.

purposes therein stated. This is a sufficient averment upon that subject for the petition to contain. Whether the property in question was necessary to accommodate the spur tracks mentioned, and whether the taking was necessary to develop business along the line of petitioner's road, were questions to be judged of by the board of directors, and the petition sufficiently alleges this had been done, and gave their conclusions. Whether or not the public use required the taking of the property was a question for the commissioners to determine. They viewed the premises, and heard the testimony upon the subject, and they determined the taking was for public use.

It was unnecessary for it to appear that more was done in the construction of the road than is stated in the petition, before appointing commissioners. How. St. § 3332. If more is stated in the petition than the statute requires, it will be no reason for refusing the appointment, if the statutory requisites appear, and are substantiated before the court making the appointment. The petition states that the map of the road sought to be constructed showing the property asked to be condemned, was made and filed.

It is quite clear that the action of the state crossing board, approving the map, should precede any attempt to condemn the crossing; and respondents claim that in this case there was no authority in the board to approve the map made; that it was not certified by a majority of the directors. The Toledo, Saginaw & Mackinaw R. Co. was organized in the fall of 1887, and on October 13th filed its map, upon which, at East Saginaw, it appears, with the terminal branches for which condemnation is now sought. They were a part of the petitioner's proposed road, designated and surveyed with the main line at the same time, and there is no reason why for the purposes of the map they should not be considered a part thereof. As such, they received the certified approval of the board of directors; and we think that should be held sufficient to give the state board jurisdiction to act, and to make the proper order in the premises. It was not necessary that it should be found essential to the development of business along the line of the road that spur tracks or branches should be constructed by any other board or tribunal than that of a majority of the directors, before the state crossing board might act. It was only necessary for it to appear that the majority of the directors had adjudged or determined that it was necessary, expedient, and proper to build such spurs and branches before the state crossing board took their action to make this proceeding proper, and this is expressly stated in the petition.

We see no objection to the petitioners discontinuing their pro-

Plot of road—
Crossing-board
—Jurisdiction.

ceedings as to the King-Street branch. It could not affect the action to be taken as to the other branches.

The main question to be considered, however, and which we regard as the important one in these proceedings, is raised in the sixth and seventh objections to confirmation made by respondents' counsel, and in the third clause of the fourth objection: (1) That the purpose for which the rights are sought to be condemned is a

Main question for consideration.

private and not a public, one; (2) that the evidence before the commissioners did not show that the taking of the property in question was necessary for public use, but, on the contrary, showed that no such necessity existed; (3) that it does not appear that any part of the line of the petitioner's railroad has yet been constructed. Upon the last point we have said all that we desire to. The statute requires that the articles of association of a railroad company must contain the name of "the places from which, and to which, and the name of each county into and through which, it is or is intended to be constructed." How. St. § 3313. The

Manner of securing right of way.

right to construct the road between the places named is thus conferred upon the company when it is legally and properly organized; but before the company can construct its road it must make a survey of the route it desires for that purpose, and make a map of the same, and file it in the office of the register of deeds. It may then secure the right of way over its surveyed line by private negotiation with the owners thereof, or, if unable to do so, it may take condemnation proceedings for the purpose; and, before the right of way can be acquired in such case, both the necessity for taking and just compensation for the property must be ascertained by commissioners or a jury, as the owner may choose. The map and survey adopted by the board of directors is intended to and must designate the line of the road by which the place of termination is reached, and the line or lines upon which it is proposed to enter such place, with the grounds to be occupied for its terminal facilities for the transaction of its business, and both should be selected with a view to the business of the road, and the convenience of the same, and the necessities of the public; and the property and franchises of a railroad company, or of any other company, like the property of an individual, when condemnation is to be had, must be subject to such necessity. Except in the case of a railroad, its franchises cannot be seriously impaired, or to the extent of depriving it of the same.

Same—Crossing another road.

The line or lines the board of directors may adopt for its road on entering a city or village, in reaching the terminal points, when made a part of the original survey and map, constitute and become a part and parcel of its main line; and when the map

and survey shall have received the approval of the state crossing board, and been filed with the register of deeds of the county in which the crossings are to be made, the rights of way of other roads may be condemned for the use of the crossing road, as in the case of private property, and it will make no difference whether the new road proceeds through the place to the terminal points by one or more terminal lines. The construction of

Same—Construction of branch.

a branch or spur, or the extension not included in or with the main line, and as a part thereof, after the map and survey have been adopted and approved by the state crossing board, or after the railroad has been completed, presents another and entirely different question. It then becomes an added section of the road. The circumstances may or may not be the same as when the main line was constructed. The convenience and necessity in the one case may be far different from those in the other; but that question is not now before us, and it is unnecessary to discuss it further. The same power and authority existed in the company to condemn the respondents' right of way for its spurs or branches as for the main line, and it was not necessary that any portion of its line should have been completed, for the company to do this. The company is also given power by the statute to condemn the rights of way across the respondents' track, if necessary to obtain it. Section 3316, Laws 1887, p. 294. It is true that a

Question of public use.

railroad company cannot be organized under the general statute, or by special enactment, with the power to condemn a right of way for a strictly private use. Such a statute would come within the prohibition of the constitution; and, while all railroads not constructed by the state or general government are more or less for private gain, still it is nevertheless true that the construction of no such railroad can be authorized by the legislature under the constitution unless some public interest or necessity is subserved thereby, and the approval of the crossing board of such a scheme would be of no avail. The object in constructing petitioner's road is for the transportation of freight and passengers. A large and profitable portion of the freighting business, it appears from the record, cannot be reached in the ordinary way of moving the same, except by the extension of their road to the points designated by the board of directors, and that the road cannot be operated unless it can secure the business of moving such freight; that for this purpose the construction of the branches designated is necessary. If this is true, it is difficult to see why the construction of the branches should not be regarded for public use, as well as the construction of the main line, which is not controverted. It would appear that the object of the petitioner is to acquire important facilities for the transaction of the legitimate

traffic and business of its road now being constructed, when completed. It is evident that the business to be reached by the use of the branches, while it may enhance the profit of some individuals, and is largely for the gain of the company, it is equally certain that the use of the road for that purpose is of a public nature, and, like all the other business of the road, it is necessary to be reached in order to enable the company to operate its line of road. Indeed, the record shows that the construction of the branches and spur tracks laid down upon the map are essential to any successful operation of petitioner's road, and must be held for the public use. This is not the case of a company seeking the condemnation of property to reach some private business, not essential to the successful operation of its road, and for private use, as claimed by counsel for respondents. The public character and use of the branches are as well established as are those of any portion of petitioner's road. We think the proceedings should be affirmed, with costs.

CHAMPLIN and LONG, JJ., concurred.

CAMPBELL, J. (*dissenting*).—I cannot agree in the conclusions of the chief justice in this case, or upon the action of the state crossing board which was brought before us at the same hearing. The whole proceedings are, in my opinion, in violation of the railroad laws, and absolutely void. I propose to refer only to those matters which are fundamental. I doubt very much whether the other objections taken are not sound; but, if there was no power to authorize lands to be condemned at all, the questions of regularity do not become important. As the opinion of the chief justice does not, as in his view it was not necessary he should, state the peculiarities of these applications, I will point out such of them as it is necessary, in my view, to state. The petition states the petitioner to be a corporation authorized to make a railroad from Durand, in the county of Shiawassee, *via* Saginaw, to Mackinaw City, in the county of Cheboygan, and that it was the intention to construct and maintain it throughout "from and to the said places named, for that purpose, in its articles of association, including all the branch lines and spur tracks connected therewith in the city of East Saginaw;" that the work had been divided into two divisions, for purposes of construction, and that division extended from Durand to the Saginaw river, in East Saginaw; that the railroad runs from a point named, and through towns named, to a point in the northwest quarter of section 21, near the southerly limits of East Saginaw, and "thence, by two separate tracks, to the Saginaw river." The northward track is designated on the map and petition as petitioner's main or through line of road. It then proceeds to describe what it calls

Averments in
petition.

branch roads or tracks; the principal one crossing Washington avenue, near Sidney street, where it again branches into two more branches, one called the "King-street Branch" and the other the "Middle-ground Branch," which latter coasts the bayou, and terminates at the middle ground in the river. These several branches are stated in the petition to have been determined necessary to develop business along the line of the railroad, and to obtain a river front on the Saginaw river, and reach and accommodate the shipping interest. The remainder of the petition states various matters relating to the details of the work desired, and making the crossings over respondents' roads. The King-street branch was relinquished on the hearing below. Whether this was regular is not important, in my view of the case. We have, then, in brief, a railroad organized to run from Durand, through Saginaw, to Mackinaw City, with its main track reaching Saginaw river, away from any of what the petition treats, and properly treats, as its franchises. It further gives, as a reason for the creation of branches, the necessity of developing its business; putting its rights entirely under section 28 of article 2 of the railroad act.

Statutory provisions.

That section allows a company to "build such spur tracks or branches as may be found necessary to develop business along its line of road, as the board of directors may judge to be expedient, and for that purpose shall have the same powers and rights in all respects as are conferred upon it for the construction of the main line, and may subscribe to the capital stock of any other company organized under this act, with the assent of such other company," etc. "All companies owning or operating such spur or branch railroad, or making any such contract or agreement with connecting or intersecting lines of railroad, shall furnish cars and transport freight over such spur, branch, or connecting road, at the same rates, and subject to the same restrictions and regulations, as shall be adopted for the transportation of freight upon the main line." By section 45, railroads having either or both of their *termini* on navigable streams, between this and other states and Canada, preventing direct railroad connection, may own or operate vessels to form such a connection.

Legality of condemning for branch roads.

The chief question to which I propose to refer is the legality of condemning lands or crossings for such tracks as this petition proposes to condemn, as well as the further question whether in the present case such branches could be so laid if in any case allowable. I think it is impossible, under this petition, to regard anything described in it for condemnation as belonging to the main track. The petition itself makes no such pretence. The statute for many purposes draws a clear distinction between the main track and all others. The main track is throughout treated as a single line

between two *termini*, and its right to form water connections is confined to those two *termini*. Apart from the other objections this has a bearing on the Middle-ground branch. That is proposed to have a terminus of its own on navigable water, to accommodate the shipping business. The legislative policy, as designated in both special charters and general laws, has not been to give railroad companies power at any place not a terminus to make water connections. Under the old special charters, amendments were required to authorize such connections at all at any but the original *termini*, and the general law is positive on the subject. There must have been some reason for it. It very probably may have been the purpose of the legislature to make each road a single highway from one point to another. In other highways and turnpikes the law has been strictly construed against extending them beyond or away from the fixed bounds; and in several cases in this court we have held the franchises could not be exercised beyond those bounds. But when we look at the powers given to build roads, this appears more plainly. The only roadway that any railroad company is authorized to acquire by condemnation is to lay it out "not exceeding one hundred feet in width." Article 2, § 9. Lands may be had for depot grounds, and for embankments, and other adjacent purposes, necessary for the safe building of the track. Whatever road is laid must be within the line of 100 feet, or in the yards and depot grounds. There is no such thing contemplated as a series of tracks forming half a dozen *termini*. This is also in the direct line of legislation on all artificial ways. No one has supposed that power to lay out one line involves power to lay out any more than one. Franchises, especially such as involve condemnation of lands, cannot be enlarged beyond the grant, as fairly construed. It cannot be held, I think, that a single company, under a power to go from A to B, can spread out in all directions, and cover different routes, long or short. If this could be done, the road first occupying the ground has, under the statute, some protection against rivalry in important respects, and under such a claim as this it might very easily change its whole pretended character. I cannot therefore agree with the chief justice in considering the question of condemnation for branches as out of the case. It seems to me to be the very and only fundamental question in the cause. Petitioner makes no other case.

Section 28, as already seen, authorizes branches and spur tracks to be built, and, in proper cases, to be built under the right to condemn lands. But this cannot mean that everything that a railroad chooses to call a branch is one under which lands can be appropriated. Taking this section together, it clearly indicates that these so-called "spurs" or "branches" shall be in themselves highways of transportation, over which the same rights

exist in the public, and in favor of other railway companies for carriage, as on the main line. They are treated as roads in themselves, analogous to any other road, and just as public in their nature. They are treated in this section as connecting roads are in the hands of other companies; and there is nothing to indicate that a railroad may lay out tracks and condemn lands for any branches that are not for public use and convenience. Each branch is treated in the statute as a separate enterprise, by itself. It cannot be seriously claimed that these branches are distinct highways, or serve any such purpose; and, if not, the company cannot compel land-owners to submit to them, or grant them in one petition, and keep them from separate consideration. It is not true in this state, as it is in some others, that a company once organized has an absolute right to secure its road. Under our constitution, any one can be allowed to make such an organization. But, when it comes to taking land, the necessity of the enterprise for the public utility must be determined by a jury or commissioners. This cannot be settled once for all. On every occasion of condemnation proceedings, this question is open, and may be decided against the power. This record shows plainly enough that this doctrine was not laid before the commissioners. Their finding shows conclusively that they considered themselves as only inquiring whether the land was needed for the branches, and not for the public use in any other sense.

This suggests another question much dwelt on at the hearing. No branch is allowed by the statute except as it is found "necessary to develop business along its line of road." This implies the existence of a road to do business. No such road existed when this land was sought to be condemned, and it is not made a condition of condemnation that any shall be built. It is easy to see that, with these short lines running in every direction through East Saginaw, if they can be separately established, the whole main line, which may be of no account, may be dropped or subordinated. Proceedings set up for one purpose, as parts of one road, may be used to put in single hands the key to the local business, and to make the short tracks an end for separate profit as feeders to other roads, instead of means to help the main line. I do not think this is allowable. No rule of corporation law is plainer than that corporations must keep within the lines and conditions of their chartered privileges. The legal powers of our railroad companies are very great, but they are limited to such connections as the law specifies; and their power to take lands from unwilling owners is, by the constitution, confined to public, and not corporate, necessity. That principle is violated by these proceedings. Passing by the minor irregularities, which might be rectified in these or other proceedings, I think the objections referred to are absolute and incurable. There was no power, I

think, in the commissioners of crossings to permit these crossings, and no power to condemn the right of way. I think the action of all parties in the matter should be quashed.

MORSE, J., concurred.

Right to Construct Branch Roads.—See, *ante*, Pittsburg, etc., R. Co. v. Benwood Iron works, and note.

Eminent Domain—One Road Crossing Another—Authority.—It has been held that every railroad corporation takes its right of way, subject to the right of the public to have their roads, common ways, and railways constructed across its track wherever the public exigency shall demand it. See *Costey R. Co. v. Moss*, 23 Cal. 324; *East St. Louis C. R. Co. v. East St. Louis E. R. Co.*, 108 Ill. 265; s. c., 17 Am. & Eng. R. R. Cas. 163; *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.*, 105 Ill. 389; s. c., 44 Am. Rep. 799; 14 Am. & Eng. R. R. Cas. 62; *Massachusetts C. R. Co. v. Boston C. & F. R. Co.*, 121 Mass. 125; *New York & H. R. Co. v. Forty-second Street R. Co.*, 50 Barb. (N. Y.) 285, 309; s. c., 26 How. (N. Y.) Pr. 68; 32 How. (N. Y.) Pr. 481; *Lake Shore & M. S. R. Co. v. Cincinnati S. & C. R. Co.*, 30 Ohio St. 604. For this reason, it has been said not to be necessary that any expressed power for that purpose should be given. *Morris & E. R. Co. v. Cent. R. Co.* 31 N. J. L. (2 Vr.) 205.

It was held by the court of appeals of New York in the case of *In re New York, L. E. & W. R. Co.*, 110 N. Y. 374; affirming s. c., 44 Hun (N. Y.), 215:

"A petition by a railroad company to prevent a proposed railroad from intersecting its tracks in the place and manner proposed cannot be brought under Laws N. Y. 1850, c. 140, § 22, which provides that any occupant of land over which a proposed railroad is about to pass may apply for the appointment of commissioners to examine the route, etc., but should be brought under section 28, authorizing one railroad company to cross the tracks of another, and providing for a commission to determine the grades, etc., in case of disagreement; the evident intention of the legislature being that railroad companies should be confined to the remedy provided by the latter section."

BROWN *et al.*

v.

ROME AND DECATUR R. CO.

(Alabama Supreme Court, December 18, 1888.)

Eminent Domain—Lands of Infant—Petition for—Allegations of.—Under the Alabama Sess. Acts 1884-85, p. 223, a petition to condemn lands of an infant for the uses of a railroad company need not aver an offer and unsuccessful attempt to purchase the land.

Same—Width of Strip—Alleged in Petition When.—Where it is sought by such petition to obtain a strip of land more than one hundred feet in width, the petition should state the purposes for which the extra width is

sought, and the same should be one of those for which the statute makes provision.

Same—Extra Width—Description.—Such petition should describe the portion of the line at which the extra width is sought.

Same—Infants Lands—Condemnation Money.—A decree condemning the lands of a minor for railroad purposes should not order the condemnation money to be paid to the guardians *ad litem*.

Same—Condemnation Proceedings—Challenge of Jurors.—In the absence of statutory provisions, no right of peremptory challenge of jurors exists.

APPEAL from Probate Court, Cherokee County.

The facts are sufficiently set forth in the opinion.

Matthews & Daniel for appellants.

Walfen & Son. for appellee.

STONE, C.J.—The present record presents for review only that part of the probate court proceedings which affects the interests of Thomas P. McElrath's children. The proceeding was instituted by the railroad company to obtain condemnation of certain interests in real estate for the use of the railroad company, and is governed by article 2, c. 17, tit. 2, pt. 3, Code 1876, commencing with section 3580, and by the act to amend the charter of the Rome & Decatur R. Co., approved December 9, 1884 (Sess. Acts, p. 223). "The authority given by the statute to railway companies to take the lands of individuals by compulsion must be exercised strictly in conformity to the terms of their charters, and the general laws defining their powers." 5 Wait Act. & Def. 284, 286; *Sharp v. Johnson*, 40 Amer. Dec. 259, and note; 1 Redf. R. R. § 64; *Pierce R. R.* 170, 494; *Mills Em. Dom.* § 92; *Chandler v. Hanna*, 73 Ala. 390. The proceedings in the present case were instituted and concluded before the Code of 1886 went into effect. It is therefore governed by the Code of 1876, and by the amended charter of the railroad company. Sess. Acts 1884-85, p. 223.

The petition refers to certain exhibits, and makes them part of it. These exhibits are not found in the record before us.

Possibly they would answer some of the objections to the sufficiency of the petition which counsel rely on. If this could be true of all the objections, it might cast on us the duty of having the record made complete before we announce our judgment. We find some imperfections, however, which the exhibits could not heal, and which render a reversal inevitable. A *certiorari* could accomplish no good result, and we will not order it.

One objection urged to the petition is that it should have averred that the owners of the land, being infants, were without guardians and without trustees; or that it should have averred that an offer and attempt had been made to purchase such

Facts—Authority to be strictly exercised.

Incompleteness of record.

right of way from the guardian or trustee, and that they could not agree on the value of the damages. In the absence of the amendatory act of incorporation (Sess. Acts 1884-85, p. 223), this position would appear to be well taken (Code 1876, § 1832; Mills Em. Dom. § 105). The amendatory act (section 6) changes the rule as to the Rome & Decatur R. Co. Its language is "that if the owner or owners of the lands which may be required for the uses and purposes in this act mentioned cannot agree with said corporation on the value of the damages, or in such case owner is an infant, non-resident, or *non compos mentis*, such value or damages shall be ascertained in the manner directed by the general laws of the state of Alabama in such cases made and provided." Under this statute we hold that when the owner of the lands is a minor, even though he has a guardian or trustee, no previous attempt to agree on the damages need be shown either in the petition or proof. There is nothing in this objection.

No attempt to purchase land necessary.

A second objection to the proceedings is that both in the petition and in the order the right of way petitioned for and condemned is more than 100 feet wide. The right to condemn for "right of way" under the general law (Code 1876, § 1830) is limited to "a strip, tract, or parcel of land not exceeding one hundred feet in width." So, under the amendatory charter (Sess. Acts 1884-85, p. 224), the width is likewise limited. "Not exceeding one hundred feet in width" is its language.

Width of right of way.

We do not deny that equally under the general law (Code 1876, § 1830, subds. 2, 3), and under the amendatory statute (section 5), the railroad corporation may acquire an easement in lands, beyond the 100 feet in width, for any of the purposes therein enumerated. We need not state or repeat the purposes here. They are expressed in the statutes. When, however, it is desired to obtain a strip broader than 100 feet, the petition must state the purpose for which the extra condemnation is sought, and it must be one or more of the purposes for which the statute makes provision. Such extra condemnation cannot be awarded under a petition which prays only for a right of way. The petition in the present case is defective in that it does not specify the purpose for which the easement was prayed in excess of the 100 feet. It should also describe the portion of the line at which the excess of width is sought. This can be done by furnishing an initial point, with such description that a surveyor can fix it with certainty. When, as in this case, the strip condemned is not of equal width, entirely across any particular tract or holding, it must not be left in uncertainty at what point the widened strip will fall. The proceeding must

individualize and furnish the means of certainly locating the *situs* and extent of the condemnation. The lands of the appellants, through which the right of way was sought and obtained, are described as N. E. $\frac{1}{4}$ sec. 36, township 9, range 9 E. The description in the decree of condemnation is: "For the distance of 2660 feet through the S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ sec. 36, T. 9, R. 9 E., as shown by Exhibit B, hereto attached, to be 200 feet wide for 1800 feet, and 66 feet wide for 860 feet." As we have said, the exhibit is not in the record, and we cannot know what it discloses. It may show the point at which the wider strip commences. The present record does not.

The decree should not have ordered the damages or condemnation money to be paid to the guardian *ad litem*. It should be kept in the court until a guardian was appointed, or some other person legally authorized appeared to claim it.

The statutes under which the proceedings were had make no provisions for peremptory challenge of jurors. Unless given by statute, no such right exists. *Convers v. Railroad Co.*, 18 Mich. 459; *Railway Co. v. Howard*, 20 Mich. 18; *Davis v. Railroad Co.*, 60 Me. 303. Only challenges for cause should be allowed in cases like the present.

Reversed and remanded.

Eminent Domain—Condemnation—Excess—Injunction.—In the case of *Nihan v. St. Catherines & N. C. R. Co.*, 16 Ont. Rep. 459, the defendants, who were originally incorporated under an Ontario act, gave notice of their intention to expropriate certain lands, and also executed the usual bond, which was duly allowed by the county judge, and possession taken by them. Subsequently, the Act 51 Vic. ch. 78 (D.), was passed, bringing the railway under the legislative authority of the Dominion, and incorporating the provisions of the Dominion Railway Act as to the expropriation of lands, except where inconsistent with the Ontario act, but ratifying all acts already done in that regard. Afterwards the arbitrators who had been appointed in the matter of the above lands, to give the compensation therefor, gave notice of intention to proceed with the arbitration; immediately after which the defendants gave notice of desistment, and then a new notice of intention to expropriate the same with other lands, and subsequently another notice specifying the original land only. *Held*, that the notice of desistment served, avoided the original bond, and the defendants must now give security by deposit of money in a bank, instead of a bond, that being the mode of giving security under the Dominion Railway Act; and unless they did so, the plaintiff is entitled to an injunction restraining the defendants from using the land.

In this case the railway company gave notice of their intention to expropriate certain lands adjoining their lines, but which were not required for building any of their works upon; and the evidence showed grounds for supposing that the powers were to be exercised for other than those purposes which the railway laws of this country permit and allow: and the court held that they should be enjoined from proceeding with the expropriation.

See, generally, as to the amount of land which may be condemned, *Forney v. Fremont, etc.*, R. Co., 33 Am. & Eng. R. R. Cas. 162, note 166.

LAFFERTY

v.

SCHUYLKILL RIVER EAST SIDE R. CO.

(Pennsylvania Supreme Court, February 25, 1889.)

Eminent Domain—Railroads—Location of Road—Right to Occupy Lands.—Where a railroad company locates its line of road over lands of private owners, it secures thereby a right to enter upon and occupy the land covered by such location.

Same—Entry—Payment of Damages.—An actual entry cannot be made until the damages accruing to the owner shall be secured.

Same—Crops—Compensation.—Where the owner waits for the company to take the initiative and continues in the meantime to occupy and cultivate the land, the crops planted after the location and before notice or bond given by the company, are proper subjects for compensation.

Same—Lessee—Estoppel.—Where one takes a lease of land with notice that a line of railroad has been located thereon, he cannot be heard to complain that the value of his term has been diminished by a circumstance of which he had full notice.

Same—Lessee—Right to Occupy and Cultivate Land.—Where such lessee has no notice of the time when the company will take actual possession of the premises, he has the same right to occupy and cultivate that his lessor would have had if no lease had been made.

Same—Lessee—Notice of Rights—Payment to Landlord.—Where a railroad company enters upon leased lands finding the lessee in possession and his crops in the ground, they are fixed with notice of his lease, and cannot discharge their liability to him by payment to his landlord.

ERROR to Common Pleas, Philadelphia County.

The suit is in trespass by plaintiff for damages by defendant in constructing its railroad through the farm of which plaintiff is a tenant. The lease provided among other things as follows: "It is further agreed that the said John Krider shall not be liable to the said Henry Lafferty for any losses or reductions in rent of said premises by reason of the present contemplated railroad passing through the said premises." Plaintiff at once entered upon the land subsequently taken by defendant, and from time to time plowed, and planted the same with crops. Part of the land taken by defendant had upon it crops belonging to plaintiff, which were entirely destroyed by defendant; subsequently the defendant commenced actual negotiations with the lessor for the terms of entry, which resulted in an agreement of the company to pay the lessor \$6000 for the right of way through the lands clear of all incumbrances and free from any tenants' claim. Immediately after completing this contract with the

lessor the defendant entered upon the premises and paid the lessor \$6000 and took the deed. On the trial the plaintiff offered to show by parol that the purpose and intention of the aforesaid clause in the deed was that plaintiff should continue to pay the rent, even if the railroad should be built, and that he must look to the railroad company for whatever damages he suffered. This offer was overruled and a nonsuit entered.

Further facts sufficiently appear in the opinion.

Baird & Hopkinson and *Preston K. Erdman* for plaintiff in error.

Wm. H. Addicks and *Lewis C. Cassidy* for defendant in error.

WILLIAMS, J.—When a railroad company locates its line of road over the lands of private owners it secures thereby a right to enter upon and occupy the land covered by such location. The actual entry cannot be made until the damages accruing to the owner shall be paid or secured; but the means for ascertaining the damages are provided by law, where the parties cannot agree upon them, and the owner cannot prevent the exercise of the right of eminent domain by the company. But while the owner has notice, by the location of the road over his lands, of the purpose of the company to appropriate so much as the line of the road covers, he has no notice of the time when actual possession will be required. He may doubtless abandon the land covered by the line as located to the company, and proceed to have his damages assessed; or he may wait for the company to take the initiative, and continue meantime to occupy and cultivate it. If he takes the latter branch of the alternative, the crops planted after the location, and before notice or bond given by the railroad company, are proper subjects for compensation. The reason for this is that it may be months, or even years, after the location of the line before the company will be ready to enter upon the land for purposes of construction, or to take the steps necessary for the assessment of damages; and the owner has a right to remain in possession until actual appropriation of his land by the company. This was held in *Gilmore v. Railroad Co.*, 104 Pa. St. 275, and has been recognized in other cases. If, therefore, Krider had made no lease of his land, but continued to cultivate it himself, he could have been entitled to claim damages as well for the loss of growing crops as for the injury done to the land, provided the crops had been planted before bond given, or notice of an intent to enter upon the construction of the road. But Krider made a lease to Lafferty, and the tenant planted the crops that were destroyed. He had notice of the fact that a line had been located over the land. The court so found, and we think the evidence was sufficient to justify the finding, but

Lessee—
Rights of own-
ers—Growing
crops.

it is not alleged that he had any notice of the time when the company intended to make an actual entry. So far as he had notice he was, of course, affected by it, and he cannot now be heard to complain that the value of his term has been diminished, and his just expectations disappointed, by a circumstance of which he had full notice, and which his lease shows had been considered before he executed it; but, being without any notice of the time when his possession would be interfered with, he had the same right to occupy and cultivate that his lessor could have exercised if the lease had not been made. The lease transferred the possession, with the attendant right to cultivate, from the lessee, and the right to be paid for an injury done to growing crops passed with the right to plant them. When the railroad company made their entry upon the land they found Lafferty in possession, and his crops in the ground. They were fixed with notice of his lease by his possession, and they could not discharge their liability to him by payment to his landlord. This branch of the plaintiff's claim seems to have escaped the attention of the court below, and for this reason only the judgment of nonsuit must be reversed, and a *venire facias de novo* awarded.

Eminent Domain—Wrongful Entries—Improvements—Estoppel—Ejectment.—It is said in the case of *Alleghany V. R. Co. v. Colwell*, 15 Atl. Rep. 927, decided by the Supreme court of Pennsylvania, Oct. 29, 1888, that where a railroad company enters upon land, and without compensation to the owner, or proceedings to condemn, puts its improvements thereon, with his knowledge, he is not estopped from maintaining ejectment against it; but execution will be stayed, on payment of costs, for a time sufficient for the company to condemn the land.

LOUISVILLE, NEW ALBANY AND CHICAGO R. CO.

v.

SOLTWEDDLE.

(*Indiana Supreme Court*, Dec. 12, 1888.)

Eminent Domain—Railroad Company—Ejectment—Estoppel.—A land owner who surrenders possession of his land to a railroad company without pre-payment, and by express or implied acquiescence induces the company to expend money in constructing and equipping its road, cannot afterwards maintain ejectment and recover his land. In such case he is confined to the recovery of damages by appropriate method for the location and construction of the road.

APPEAL from Circuit Court, Lake County. Facts sufficiently appear in the opinion.

George R. Eldridge, George W. Easley, and Bayless & Russell for appellant.

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MITCHELL, J.—Soltweddle sued the railroad company in ejectment to recover possession of real estate, and also to recover damages for injuries occasioned by the construction and operation of the company's said road over the plaintiff's land. The action was commenced on the 27th day of March, 1885, and such proceedings were had as that on the 25th day of May, 1885, judgment was rendered in the Lake circuit court in favor of the plaintiff. The court made an order directing that a writ issue to the sheriff of Lake county, commanding him to put the railway company out and put the plaintiff into possession of the land described in the complaint. It was further ordered and adjudged that the defendant pay the plaintiff \$175 damages. The question is presented whether or not, under the pleadings and evidence, the judgment can be maintained. We are not favored with a brief or other argument on appellee's behalf. Recent decisions of this court settle the question conclusively in the negative. It appeared in evidence that at the time the action was commenced the plaintiff was the owner of lot No. 33, in one of the additions to the city of Hammond, in Lake county, and that the front of his lot abutted on Fayette street. In December, 1883, the railroad company, whether with or without the consent of the municipal authorities does not appear, constructed its road in such a manner as that its line ran diagonally across Fayette street, in front of the northeast corner of the plaintiff's lot. The purpose of the action was to eject the railroad company from, and to recover possession of, so much of the street occupied by the company's track as lay in front of the plaintiff's lot, and to recover damages for the obstruction of the street, and for injury to the plaintiff's property, occasioned by the construction and operation of the road. There was no dispute but that the road had been fully completed and put into operation more than a year before the suit was commenced. It did not appear that the plaintiff took any steps to prevent the location or construction of the road in front of his lot, or that he was not fully apprized that it was being constructed. Having, so far as appears, stood by and acquiesced while the work of construction was in progress, and until the interest and convenience of the public became involved, he is in no position now to arrest the operation of the road by ejecting the railroad company from a part of its line. The law plainly is, that a land-owner who surrenders possession of his land to a railroad company without pre-payment, and by express or implied acquiescence induces the company to expend money in constructing and equipping its road, cannot afterwards maintain ejectment and recover his land. This subject has been so fully considered in recent decisions of this court that further consideration of it

Ejectment not maintainable.

here is unnecessary. *R. Co. v. Smith*, 113 Ind. 233; *R. Co. v. Clifford*, 113 Ind. 460; 33 Am. & Eng. R.R., Cas. 81; *R. Co. v. Allen*, 113 Ind. 581; *R. Co. v. Nye*, 113 Ind. 223; *Bradard v. R. Co.*, 115 Ind. 1; *Sherlock v. R. Co.*, 115 Ind. 22. The foregoing authorities make it clear that the plaintiff is now confined to the recovery, by the appropriate method, of such compensation and damages as he may be entitled to on account of the location and construction of the road. The judgment is reversed, with costs, with instructions to the court below to sustain the appellant's motion for a new trial.

Eminent Domain—Ejectment—Estoppel.—In the case of *Mobile & G. R. Co. v. Coggsbill*, 5 So. Rep. 188, the supreme court of Alabama, in ejectment against a railroad company for a strip of land claimed by plaintiff by adverse possession, it was not permissible to prove that any of the officers of the railroad company recognized plaintiff's title to the land, by offering to purchase a part of the premises from her, unless the authority of such officer was first established, or his acts were shown to have been afterwards ratified by the company. The court also held that proceedings for the condemnation of the land in controversy, instituted by defendant company in the commissioner's court, even though invalid for irregularities of procedure, constituted color of title, under which the company could adversely hold the premises.

It is said, *Bravard v. Cincinnati, Hamilton & Indianapolis R. Co.* (Ind.) 14 West. Rep. 817, that the accepted doctrine now is that where a railroad company enters upon the land of another without the consent of the owner, and not by the exercise of the right of eminent domain, it may be ejected from the land or enjoined from appropriating or using it, if the owner shall proceed with reasonable promptitude; but that if the owner stands by and acquiesces until the company has expended its money and constructed its road across his land, and until the road at that point has become a part of its railroad line, whereby the public as well as the company have acquired an interest in the maintenance of the enterprise, he forfeits every remedy except that of proceeding to have his damages assessed and collected from the company. *Midland R. Co. v. Smith*, 12 West Rep. 699; *Indiana, B. & W. R. Co. v. Allen*, 12 West Rep. 887; *Evansville & T. H. R. Co. v. Nye*, 113 Ind. 223; 12 West. Rep. 727.

Same—Illegal Entry on Land.—It is said by the supreme court of Indiana, in the case of *Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 308, where a railroad company enters upon land without right, and, with the knowledge and acquiescence of the owner, constructs a railroad thereon, and operates its railroad in the public service until public rights have been acquired, this will, on the ground of public policy, preclude him from severing the line of railroad by a possessory action, but it will not preclude him from recovering compensation.

In this case the court say: "The general rule is that, where land is seized by a railroad company without right, the owner may maintain ejectment. *Graham v. R. Co.*, 27 Ind. 260; *Graham v. R. Co.*, 36 Ind. 462; *Cox v. R. Co.*, 48 Ind. 178-194; *Sharpe v. R. Co.*, 49 Ind. 296; *R. Co. v. Rodel*, 89 Ind. 128. The principle which underlies this rule is the same as that which supports the general rule that an owner may maintain injunction against a corporation who seizes his land without right. *Anderson v. Kernodle*, 54 Ind. 314; *Midland R. Co. v. Smith*, 113 Ind. 233; s. c., 15 N. East. Rep. 256. But the rule of which we are speaking is a general rule, subject to many exceptions, and to more restrictions than ordinarily surround general

rules. One important exception is that a failure to bring the action until after public interests have intervened will prevent its successful prosecution. Acquiescence for a considerable period after the railroad company has entered upon its duties as a common carrier will ordinarily defeat the action. This element did not enter into the earlier cases decided by this court, and those decisions are not decisive of a case where it exists and is brought into issue. Here it exists, and is asserted as a defence. Our conclusion is that acquiescence does defeat the action of ejectment, unless there are countervailing facts or some element which nullifies the force of the acquiescence. We do not assert that it will defeat any action, for we are satisfied that it will not ordinarily defeat an action where only compensation is sought. What we affirm is that acquiescence, after public rights have intervened, will prevent a land-owner from destroying the line of road by wresting possession of a part of it from the company. This principle does not rest upon the right of the railroad corporation so much as upon considerations of public policy. The rights of a citizen are often abridged, in order that the public welfare may be promoted. Chief among the fundamental maxims of jurisprudence is that which declares 'that regard be had to the public welfare is the highest law,' and this maxim underlies the rule we have under discussion. Under our American constitutions, the maxim is not pushed so far as in England; but it goes far enough with us to supply ample ground for denying one who has slept upon his rights a right to dispossess a railroad company, charged with a service public in its nature, and important to the social and commercial interests of the country. Compensation he may recover; possession he cannot. To the recovery of just compensation, his rights are confined. Our conclusion rests on principle, and is fortified by authority. *Railroad Co. v. Johnston*, 52 Pa. St. 290; *Smart v. Railroad Co.*, 20 N. H. 233; *Harrington v. Railroad Co.*, 17 Minn. 215 (Gil. 188); *Harlow v. Railroad Co.*, 41 Mich. 336; *Maxwell v. Bridge Co.*, 41 Mich. 453; *Railway Co. v. Smith*, *supra*; *Evansville & T. H. R. Co. v. Nye*, 113 Ind. 223; s. c., 15 N. East. Rep. 261. Vast interests are often involved in the maintenance of railroads. They are charged with a public service, and a public character is so strongly impressed upon them that courts exercise a control over them much beyond that assumed over individual citizens. They are recognized as instruments of interstate commerce, and, as such, are within the control of the federal congress. *Robbins v. Shelby Co.*, 120 U. S. 494; 7 Sup. Ct. Rep. 592; *State Freight Tax*, 15 Wall. 232; *Railroad v. Maryland*, 21 Wall. 465. They may exercise rights under the power of eminent domain because of their public character. Towns spring into existence along their lines. Factories, elevators, and warehouses are built upon them. The mails of the nation are carried by them. They are common carriers of freight and passengers. All these interests, and more, combine in demanding that a citizen who has stood by until after the completion of a line of road has involved public interests shall not be allowed to sever the line and destroy its efficiency by wresting possession of part of it from the company. The case does not stand upon the ordinary doctrine of estoppel. The great principle of public policy enters as an important factor, and controls the judgment of the court. Nor is there any great hardship upon the land-owner in yielding to its dominion. Ample remedies are open to him. He may demand and secure full compensation. He may do more, for he may invoke the aid of the strong arm of the courts, but, to do this with success, he must move before public interests are involved. If he remains inactive, better that he suffer, if some one must suffer, than the community. But he need not suffer; for compensation, if seasonably asked, will always be awarded him, although possession will be denied. We do not controvert the doctrine

that acquiescence will not preclude a recovery of damages. That we affirm to be the true doctrine. Unless prolonged until the statute of limitations has run, an action for damages will lie. After that period, however, it is conclusively presumed that the damages have been paid. *Railway Co. v. Butler*, 91 Ind. 134; 46 Amer. Rep. 580; *Blair v. Kiger*, 111 Ind. 193; 12 N. E. Rep. 293. We do not, therefore, question the soundness of the cases which hold that, within the statute of limitations, a claim for compensation, made by one entitled to assert it, may be enforced. *Rusch v. Railroad Co.*, 11 N. W. Rep. 253; *Evans v. Railway Co.*, 64 Mo. 453. Our decision does not impugn the general doctrine of such cases, but it does assert that they do not support the contention that one who has remained inactive until public interests have intervened cannot dispossess the railroad company, and thus break the line of communication."

COOPER *et al.*

v.

ANNISTON AND ATLANTIC R. CO.

(*Alabama Supreme Court, July 26, 1888.*)

Eminent Domain—Condemnation Proceedings—Error.—Errors of law committed in proceedings to condemn land by a railroad company, should be taken advantage of in the court where the proceedings are had, or on appeal to the circuit, if such errors have not been waived by the course pursued in the primary trial.

Same—Abandonment—Further Condemnation.—A railroad company having obtained a right of way, may abandon the same and proceed for a further condemnation.

Same—Vendor's Lien—Enforcement.—The owner of lands taken by a railroad company in condemnation proceedings has a vendor's lien on the property taken, and if payment therefor be withheld, the chancery court may compel payment as a condition of further enjoyment of the easement.

Same—Condemnation—Appeal.—Where a railroad company deposit with the probate judge the amount of the award and costs of the commission, an appeal therefrom will not hinder work on the condemned property; nor will an injunction lie restraining the company from such work.

APPEAL from Chancery Court, Calhoun County. Appeal to enjoin defendant from proceeding further in laying out its right of way over plaintiff's lands. In September, 1887, defendant filed its objection and application in the probate court of Calhoun county to have certain lands belonging to the complainants condemned for the right of way. Commissioners on award were appointed, who awarded to complainants compensation for the lands sought to be taken, and the probate court allowed the railroad company to go on and lay out its right of way and

build the road. The grounds on which complainants asked for an injunction in this case are: that errors and irregularities occurred in the condemnation proceedings; that the railroad company has one right of way on which it is now operating and transacting its business; that the railroad company is insolvent, and therefore a just compensation cannot be obtained by pursuing an appeal from the award of the commissioners as allowed by law. Defendant answered, denying all material allegations of the bill; demurred to the bill for want of equity, and because the complainants had a complete remedy at law, and moved to dissolve the injunction. Injunction was dissolved. Complainants appeal.

E. H. Hanna for appellants.

Brothers, Willett & Willett for appellee.

STONE, C.J.—If any errors of law were committed in the condemnation proceedings alleged to have been had in this case, they should have been taken advantage of before the probate judge, or, on the appeal to the circuit court, if they had not been waived by the course pursued in the primary trial. Such errors furnish no ground whatever for equitable interference. *Mills*, Em. Dom. § 323; *Ewing v. City of St. Louis*, 5 Wall. 413; *Secombe v. Railroad Co.*, 23 Wall. 108. Nor is there anything in the objection that, having once obtained a right of way, the railroad company is bound to adhere to it, and cannot proceed for a further condemnation. The power is continuous, and co-extensive with the wants of the corporation. It should be a clear case of abuse, to justify withholding relief on the ground that the easement asked for is not necessary to the successful operation of the railroad. 1 Ror. R. R. 274 *et seq.*; *Railroad Co. v. Wilson*, 17 Ill. 123; *Fisher v. Railroad Co.*, 104 Ill. 323; *Smith v. Railroad Co.*, 105 Ill. 511; 14 Am. & Eng. R. R. Cas. 384; *Railroad Co. v. Devaney*, 42 Miss. 555; *Railroad Co. v. Railroad Co.*, 26 Kan. 669; *Railroad Co. v. Lovejoy*, 8 Nev. 100. The amended bill charges that the railroad company is insolvent, and will not be able to meet and pay the increased damages, should such be awarded in the circuit court, to which the case has been appealed. The landholder, complainant in this bill, has ample means for enforcing any damages he may recover. He has a lien in the nature of that of a vendor, on the property taken, enhanced in value by the improvements to be put upon it; and, if the payment be withheld, the chancery court, by a restraining order, may compel payment as a condition of further enjoyment of the easement. *Hooper v. Railroad Co.*, 69 Ala. 529; 14 Am. & Eng. R. R. Cas. 526; *Railroad Co. v. Jones*, 68

Errors committed in proceedings.

Right of abandonment.

Vendor's lien—Enforcement.

Ala. 48, 70 Ala. 227; *Thornton v. Railroad Co.*, 84 Ala. 109, *ante*, 197. The case of *Browning v. Railroad Co.*, 4 N. J. Eq. 47, was, in its facts, very like the present one, and an injunction was awarded in that case. The ruling, however, was put on the ground that, under their system, the appeal suspended and superseded the judgment of condemnation, and with it the judgment in favor of the landholder for the assessed damages. Our statute is entirely different. Code 1876, § 1839. If the railroad company deposits with the probate judge the amount of the award and the costs of the commission, the appeal in nowise hinders or impedes work on the condemned property. The deposit was made in this case. The present bill is without equity, and the injunction was rightly dissolved. Affirmed.

Deposit—Appeal.

Eminent Domain—Abandonment.—It has been said that until the actual payment of the compensation, or until the company has actually entered upon and taken possession of the lands, the condemnation proceedings may be abandoned. See *Denver & N. O. R. Co. v. Lamborn*, 8 Colo. 380; s. c., 23 Am. & Eng. R. R. Cas. 115; *Peoria & R. I. R. Co. v. Rice*, 75 Ill. 329; *Burlington & M. R. Co. v. Sater*, 1 Iowa, 421; *Black v. Mayor of Baltimore*, 50 Md. 235; *Norris v. Mayor, etc.*, 44 Md. 598; *Northern Mo. R. Co. v. Lackland*, 25 Mo. 515; *Graff v. Mayor of Baltimore*, 10 Md. 544; *Leisse v. St. Louis & I. M. R. Co.*, 2 Mo. App. 105; *In re Waverly Water Works Co.*, 85 N. Y. 478; *Matter of Commissioners of Washington Park*, 56 N. Y. 144; *Martin v. Mayor of Brooklyn, Hill (N. Y.)*, 545; *Matter of Anthony Street*, 20 Wend. (N. Y.) 618; *State v. Cincinnati & I. R. Co.*, 17 Ohio St. 103; *Dayton & N. R. Co. v. Marshall*, 11 Ohio St. 497; *Stabey v. Vermont C. R. Co.*, 27 Vt. 39; *Stiles v. Middlesex*, 8 Vt. 436; *Reg. v. Commissioners of Rochdale Improvement Act*, 2 Jur. N. S. (Q. B.) 861.

However, the right to abandon is lost if the land has been reduced to possession, and public improvement constructed thereon. See *Gray v. St. Louis & S. F. R. Co.*, 81 Mo. 126; s. c., 22 Am. & Eng. R. R. Cas. 106. The same is also true where private rights so attached, which would be prejudiced by the abandonment. See *Lafayette v. Schultz*, 44 Ind. 94; *Duncan v. Louisville*, 8 Bush. (Ky.) 98; *Farnsworth v. Boston*, 121 Mass. 73; *Pinkerton v. Boston & A. R. Co.*, 109 Mass. 327; *Harrington v. Commissioners of Berkshire Co.*, 39 Mass. 263; *Jones v. Oxford Co.*, 43 Mo. 419; *Pollard v. Moore*, 51 N. Y. 188; *O'Neil v. Hudson Co.*, 41 N. J. L. (12 Vr.) 161; *Crowner v. Waterton & R. R. Co.*, 9 How. (N. Y.) Pr. 457; *In re Dover St.* 14 Johns. (N. Y.) 506; *People v. Brooklyn*, 1 Wend. (N. Y.) 319; *Garrison v. New York*, 88 U. S. (21 Wall.) 196; bk. 22 L. ed. 612.

See, generally, as to abandonment of condemnation proceedings, *Chicago, etc., R. Co. v. Gates*, 30 Am. & Eng. R. R. Cas. 268, note, 271; *In re Ruthin, etc.*, Act, 27 Ib. 434, note, 440; *Denver, etc., R. R. Co. v. Lamborn*, 23 Ib. 115, note, 122.

KANSAS CITY, CLINTON AND SPRINGFIELD R. CO.

v.

STORY.

(Missouri Supreme Court, December 20, 1888.)

Eminent Domain—Damages—Award of Commissioners—Appeal.—A judgment, confining the report of commissioners appointed to assess damages for lands taken for railroad purposes, which recites that, at the defendant's "instance and request" the commissioners were appointed in vacation, does not estop the defendant, who excepts to the award of damages when filed, from demanding a jury to assess the same.

Same—New Appraisal—Jury Trial.—Section 896 of the Missouri statute, providing that a jury may assess damages for lands taken for railroad purposes where a "new appraisalment" is ordered, does not deprive the owner of his constitutional right to a common-law jury.

Same—Plat of Lands—Description—Sufficiency.—Where a plat of the lands proposed to be taken is filed with the commissioners' report, a reference in the report to the road as "located over, through, and upon" the land in question is a sufficiently specific description of the property for which damages are assessed. (Sherwood, J., dissenting.)

Same—Assessing Damages—Effect on Other Property.—The failure of the commissioners, in estimating the damages, to consider how far the other one hundred and sixty acres in the farm would be affected, is an improper omission.

Same—Compensation—Lumping Damages.—Arbitrary and lumping methods of assessing damages for taking property are condemned. (Following *Railroad Co. v. Campbell*, 62 Mo. 585; *Railroad Co. v. Birkott*, 62 Ill. 332.)

Same—Damages—Elements of.—Cuts and fills and the inconvenience of reaching the severed portions of the land are proper subjects for consideration in estimating damages.

APPEAL from Circuit Court, Cass County.

Proceedings by the Kansas City, Clinton & Springfield R. Co., to condemn land of Thomas R. Story for railway purposes. The damages were assessed by commissioners at \$410, their report confirmed by the court, and defendant appeals.

Gates & Wallace for appellant.

Wallace Pratt and W. J. Terrell for respondent.

SHERWOOD, J.—The present proceeding was instituted for the purpose of condemning, for a right of way, certain lands owned by defendant, and others who were joined with him. The petition was presented to the judge in vacation, due notice being given to those interested, and three commissioners were appointed to assess the damages,

Facts.

etc. At the next term, the commissioners made their report. The defendant appeared and filed various exceptions thereto, and, at the conclusion of his exceptions, asked for a jury to assess his damages. Witnesses, including the commissioners, were thereupon heard as to the *quantum* of his damages. These exceptions were overruled, the report approved, a jury denied him, and he appeals.

Section 4, art. 12, of our constitution, provides that "The right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right."

Procedure—
Appointment
of commis-
sioners—De-
mand for jury.

It is urged by plaintiff that defendant waived his right of trial by jury when he appeared before the judge in vacation, and the commissioners were appointed at his "instance and request." This, however, he denied upon oath; the issue being made by plaintiff's reply to the exceptions filed, charging that such commissioners were appointed in the manner already stated, and no one testified to the contrary of the defendant's statement. It is also urged that the judgment confirming the report of the commissioners recites that, at defendant's "instance and request," the commissioners were appointed in vacation, and therefore he is concluded by the record from making any denial of such recitals. This may be granted; but what does the concession amount to? The appointment of commissioners in vacation was merely an initiatory step, a provisional measure, which might or might not fix the right of the parties, as subsequent events should determine. Besides, at the time of the appointment of the commissioners, it was impossible for defendant to have had a jury, though never so desirous of obtaining one; and if he had demanded one, and had been refused, there was no way known to the law whereby he could have saved his exceptions to such refusal. These observations sufficiently indicate that defendant is not estopped by the record, and that he did not waive his right to demand a jury. A man can scarcely waive anything which is out of his reach. And as soon as the report of the commissioners came in, and was not regarded by him as altogether just, he exercised his right of disaffirmance on the first opportunity, by filing his exceptions and demanding a jury. His demand was therefore timely.

But it is insisted that, under the provisions of section 896, a party is not entitled to a jury except a "new appraisalment" be ordered; and in this case there was none ordered, the report having been confirmed. Of this claim it is sufficient to say that if there be any incongruity between the statute and the constitutional provision already quoted, the latter must prevail. The

action or non-action of the legislative department of the government cannot defeat a constitutional right, nor place it in abeyance. The right being conceded, it carries with it the appropriate remedy. *People v. McRoberts*, 62 Ill. 38; *Kine v. Defenbaugh*, 64 Ill. 291; *Bish. St. Crimes*, § 137, and cases cited; *Ex parte Marmaduke*, 91 Mo., cases cited, pp. 265, 267. And when section 4 of article 12, *supra*, declares that "The right of trial by jury shall be held inviolate," etc., the jury there meant is "the historical jury of twelve men," with all its incidents. This rule applies without exception unless a contrary purpose is unmistakably manifested. *Cooley Const. Lim.* (5th ed.) 506. In consequence of these views and authorities, it must be held that, under the section of the constitution upon which defendant relies, he is entitled to a common-law jury, and to all the incidents which pertain to a trial by such a body of men. By none of the foregoing remarks is it intended to be intimated that a party situated as was the defendant could not waive his right to a jury trial. On the contrary, the opinion is that it was quite as competent for him to do so, and in a similar way, as if the cause were an ordinary civil action. The only point decided in regard to that is that the acts of the defendant disclosed by the record did not amount to such a waiver, and were not at all indicative of it.

The defendant claims that the report of the commissioners, filed herein, is not a compliance with section 894, in that it does not contain "a specific description of the property for which damages are assessed." My associates are, however, in the opinion that the report is well enough in this respect, since it refers to the road as "located over, through, and upon" the land in question, and gives a plat; and the plat and profile filed, according to the statute, in the office of the county clerk, shows just where the road is located, so that their conclusion is that the maxim *id certum*, etc., applies in this instance. I do not concur in this view, because I believe that the report on its face must show the precise strip of land taken; and any report falling short of this does not comply with the statute, which requires the report to contain "a specific description of the property" taken. *Mills Em. Dom.* § 115, and cases cited; *Railway Co. v. Carter*, 85 Mo. 448. The object of this statutory requirement is obvious, the intent being that the report is to be a muniment of title, a permanent memorial, which identifies with absolute certainty, and leaves nothing to parol testimony to identify, the land taken, where in after years the centre of the roadbed is shifted, and the temporary stakes have disappeared. But whatever the reason of the statute is, it is sufficient to say that its command is of itself a sufficient reason.

Report of com-
missioners—
Sufficiency.

The commissioners, in their testimony, stated that, in estimating the damages, they did not take into consideration the question of how far the other 160 acres in the same farm was affected. This was improper, under the view taken by this court in *Railway Co. v. Calkins*, 90 Mo. 538; 3 S. W. Rep. 82; *Railway Co. v. Waldo*, 70 Mo. 629, and *Railway Co. v. Ridge*, 57 Mo. 599. Compensation
—Elements of
damage.

The commissioners erred in other respects in making their estimate of damages. One of them says he put the damages at double the value of the land actually taken; another, that they "lumped" the damages at \$140; and they all say that, in estimating the damages, they took no account of the "cuts and fills." Arbitrary and lumping methods of assessing damages for taking property have heretofore been condemned by this court (*Railroad Co. v. Campbell*, 62 Mo. 585), and elsewhere (*Railway Co. v. Birkott*, 62 Ill. 332). There are numerous authorities holding that cuts and fills made by a railroad passing through a man's farm, and the inconvenience to which he will be subjected by making it more difficult to reach the severed portions of the land, are proper subjects for consideration in estimating the damages sustained. *Mills Em. Dom.* §§ 166, 189.

For the errors aforesaid, the judgment will be reversed and the cause remanded.

All concur. RAY, J., absent.

Eminent Domain—Damages—Elements of.—In this, matters can be considered in assessing damages for the appropriation of lands to a public use which are the direct result of the appropriation. Thus, it has recently been held by the supreme court of Iowa, in the case of *Doud v. Mason City & F. D. R. Co.*, 41 N. W. Rep. 65, that the owner of lands appropriated under an exercise of the power of eminent domain cannot recover or detriment to his land outside the right of way condemned, caused by the railroad company taking soil therefrom, it being a mere trespass, for which an action lies.

Respecting the elements of damage which may be considered in awarding compensation in condemnation proceedings, see 6 Am. & Eng. Encyc. of Law, tit. "Eminent Domain," VII, VIII, pp. 563-598, and the later cases of *Le Roy & W. R. Co. v. Hollis* (Kan.), 18 Pac. Rep. 947; *Redmond v. St. Paul, M. & M. R. Co.* (Minn.), 40 N. W. Rep. 64; *Blakely v. Chicago, K. & N. R. Co.* (Neb.), 40 N. W. Rep. 956; *Esch v. Chicago, M. & St. P. R. Co.* (Wis.), 39 N. W. Rep. 129; *In re Rughmier*, 36 Fed. Rep. 376.

Same—Temporary Alteration.—See, *post*, *Wabash, St. L. & P. R. Co. v. McDougall* (Ill.), 18 N. E. Rep. 291.

Same—Procedure.—In the case of *Ministee & N. E. R. Co. v. Fowler*, 41 N. W. 261, it was held that, in proceedings to condemn land for railroad purposes under the Michigan statute, the jury have only to determine the necessity of taking the property, and the damages; and the questions whether there is sufficient cause for resorting to condemnation proceedings, and whether the petition sufficiently describes the land, should be settled before allowing an inquest. As to instruction to jury, see *Redmond v. St. Paul, M. & M. R. Co.* (Minn.), 40 N. W. Rep. 64.

Same—Stipulation by Attorneys.—The supreme court of Illinois, in the

case of *Wabash, St. L. & P. R. Co. v. McDougall*, see, *post*, held that in a proceeding to reassess damages to land, where the defendant claims damages caused by constructing a trestle over his land instead of restoring an embankment that had been washed away, a stipulation signed by plaintiff's attorneys that plaintiff would restore the embankment is properly stricken from the files.

Same—View of Premises by Jury.—The supreme court of Pennsylvania held, in the case of *Traut v. New York Cent. & St. L. R. Co.* (Pa.), 15 Atl. Rep. 678, that, under Act Pa. April 9, 1856 (P. L. 289), § 3, giving power to the court to which an appeal is taken from the report of viewers, in proceedings to condemn lands for railroads, to make all such orders as may be deemed necessary, authorizes an order for the jury to view the premises after they were impanelled and sworn.

Same—Proof.—The supreme court of Illinois held, in the case of *Chicago, S. F. & C. R. Co. v. Phelps* (Ill.), 17 N. E. Rep. 769, that the petitioner was not bound, at its peril, to assume that land not taken was damaged, and to go on and try to make proof of it. Its right to the relief asked did not depend at all upon showing that the land not taken was damaged. Such proof would not have been in support of any allegation in the petition. The land-owner had the right to offer such evidence under the petition, as to all lands mentioned in it, without filing a cross-petition. Where he has availed himself of this right by offering new and independent evidence, it is clear the petitioner had the right to be heard in rebuttal of the proof showing damage to land not taken.

Same—Damages—Gross Sum.—A verdict finding a gross sum for the land-owner, instead of describing the land and finding the condemnation and damages separately, is sufficient in the absence of statutory requirements to the contrary. See *Railroad Co. v. Mayrand*, 93 Ill. 591; *Railroad Co. v. Railroad Co.*, 66 Ill. 591.

Same—Appeal.—In proceedings to take land for the purposes of a railroad, and ascertain the compensation to the land-owner, the railroad company has the right to enter upon the use of the land, upon an appeal from the trial court by the company, by complying with the eminent domain act (Rev. Stat. Ill. c. 47, § 13), providing that, upon appeal by the land-owner, the company shall be entitled to enter upon the use of the land by giving bond conditioned for paying such compensation as may be finally adjudged in the case; and if the appeal be by the company, a like bond shall be executed. *Chicago, S. & F. R. Co. v. Phelps* (Ill.), 17 N. E. Rep. 769.

It is said, in the case of *Schuylkill River East Side R. Co. v. Harris*, 16 Atl. Rep. 838, that a party who appeals to the court of common pleas from an assessment of damages by viewers, in condemnation proceedings, under the general railroad law Pa. Feb. 18, 1849, allowing an appeal by either party within 30 days from the filing of the viewers' report, and a trial *de novo* on such appeal, cannot, after issue joined on the appeal, and a trial had on the merits, withdraw the appeal without consent of the other party, and rely on the viewers' award.

Same—Appeal from Award—Parties.—Where the award of compensation, in proceedings for condemnation of land, is made jointly to the owner and mortgagees of the land taken, the owner may appeal from the assessment of damages without the mortgagees being made parties to such appeal. (Following *Lance v. Railway Co.*, 11 N. W. Rep. 612; *Dixon v. Rockwell, S. & D. R. Co.* (Iowa), 39 N. W. Rep. 646.)

Same—Amending Record.—It is said, in the case of *Chicago, S. F. & C. R. Co. v. Phelps* (Ill.), 17 N. E. Rep. 769, that, where the case was tried upon the theory that there was a cross-petition in it, and when it was discovered the transcript did not contain the cross-petition, the record, upon due notice, was amended, the irregularity is immaterial.

Same—Dismissal of Appeal.—A motion to dismiss an appeal on the ground that the petitioner, failing to obtain the order to enter upon the use of the property pending the litigation, had deposited the amount of the judgment with the county treasurer, which was paid over to the land-owner on his written agreement to refund to the railroad company in case the judgment should be reversed, and that such payments operated as an absolute satisfaction and extinction of the judgment, was properly overruled. *Chicago, S. F. & C. R. Co. v. Phelps* (Ill.), 17 N. E. Rep. 769.

For a full description of the question of procedure in actions to condemn lands for public uses, and also of appeals therein, see 6 Am. & Eng. Encyc. of Law, tit. "Eminent Domain," XIV, pp. 604-634.

ACKERMAN *et al.*

v.

HUFF *et al.*

(*Texas Supreme Court, June 28, 1888.*)

Railroads—Purchase of Right of Way and Depot Grounds—Branch of Warranty.—Defendants Ackerman and others, being in possession of seven hundred acres of land, conveyed by deed of warranty to the defendant railway company a portion thereof, to wit, a right of way and depot grounds. The railway company claimed title also by condemnation proceedings against the plaintiff. Ejectment by plaintiff against Ackerman and others and the railway company. The railway company pleaded title from the aforesaid sources, and alleged breach of warranty on the part of Ackerman and others, defendants. Judgment in favor of the plaintiffs for all the land except that claimed by the railway company; judgment in favor of Ackerman for the value of improvements; judgment in favor of the railway company for right of way and depot grounds, and against their warrantors. By agreement of the parties, judgment was affirmed as to all matters except those affecting the right of railway to depot grounds and right of way, and those affecting the right of the company to recover on the warranty. *Held*, that, as the company alleged the purchase of the right of way and depot grounds from the defendants, and their warranty deed therefor, and the judgment which was affirmed by consent shows a breach of the warranty, the judgment must be affirmed.

Same—Assignment of Error—When Invalid.—As assignment of error that "The court erred in rendering judgment in favor of the defendant because the same is not supported by the evidence" is too general to entitle the parties to a revision of the judgment.

Eminent Domain—Report of Commissioners—Statement as to Notices.—The fact that the report of the commissioners only states that the notices were issued does not tend to prove that they were not in some lawful manner served.

Same—Condemnation Proceedings—Non-residents—Notice.—The facts that some of the plaintiffs were non-residents of the state, and that between the commencement and conclusion of the condemnation proceedings suffi-

cient time did not intervene to give notice by publication, does not show that notice was not given in some lawful manner.

Same—Condemnation—Petition—Description of Lands.—Where the petition for condemnation proceeding, particularly describes the land sought to be taken, and the plat thereof is filed with them, in the absence of evidence to the contrary the lands will be held to be described with sufficient certainty.

APPEAL from District Court.

Facts sufficiently appear in the opinion.

Wurzback & Boone and *Minter & Altgelt* for appellants.

Clifford & Aycock for appellees.

STAYTON, C. J.—This action was brought by the heirs of Aipheus Huff to recover 700 acres of land claimed by Joseph Ackerman, George H. Buechsenschuetz, and August Kroeger, who, by warranty deed, had conveyed to the International & Great Northern R. Co. a right of way and depot grounds. The railway company was also made a defendant, and in addition to claim of right of way and depot grounds acquired by proceedings in condemnation had against the plaintiffs, it asserted a claim against its warrantors. There was a judgment in favor of the plaintiffs for all the land except that claimed by the railway company; a judgment in favor of Ackerman for the value of improvements made by him; a judgment in favor of the railway company for right of way and depot grounds, and against their warrantors. There were appeals by all these parties except the railway company; but by agreement of these parties, it is consented that the judgment be affirmed as to all matters except those affecting the right of the railway to depot grounds and right of way, and those affecting the right of the railway company to recover on the warranty made by the defendants. This being the state of the record, no other questions need be considered.

The defendants rely upon the following assignment of error:

Assignments of error. “The court erred in rendering judgment in favor of the defendant the International & Great Northern

R. Co. against these defendants, because the same is not supported by the evidence.” Under the statute, the rules of this court, and repeated decisions, it must be held that the assignment is too general to entitle the parties to a revision of the judgment, and proceedings that led to it. It is urged, however, that there is fundamental error, and the matter is thus presented in brief of counsel: “The court erred in rendering judgment in favor of the defendant the International & Great Northern R. Co. against the appellants, because such judgment is not supported by the pleadings.” The pleading for the railway company alleged the purchase of right of way

and depot grounds from the defendants; that they executed a warranty deed therefor; and the judgment, which the agreement of the defendants authorizes to be affirmed, shows a breach of the warranty. There is no claim that the judgment is for a greater sum than they were liable for on their warranty. Under this state of facts, the judgment in favor of the railway company against the defendants must be affirmed.

The railway company pleaded its title to the right of way and depot grounds through proceedings had against the plaintiffs to condemn, and to this the plaintiffs filed a supplemental petition setting up several grounds on which it was claimed that the proceedings to condemn were invalid; but they subsequently withdrew this, and reserved to themselves only the right to object to such proof as the railway company might offer in support of its claim through the condemnation alleged. The plaintiffs offered to introduce in evidence the proceedings against them by the railway company to condemn the right of way and depot grounds, for the purpose of showing that they had no notice of the proceedings; and these were excluded. The bill of exceptions does not show what the proceedings were except in a general way, and those parts of the proceedings found in the record from which the plaintiffs seek to draw the inference that no notice was given do not tend to that conclusion; but to the contrary, for the judgment of the court making the condemnation declares that notices were given. The fact that the report of the commissioners only states that the notices were issued does not tend to prove that they were not in some lawful manner served; nor does the fact that some of the plaintiffs were non-residents of the state, and that a sufficient time to give notice by publication did not elapse between the time the proceedings were commenced and the time the damages were assessed, show that notice was not given in some other lawful manner; nor that the plaintiffs did not appear in person or by representative; and this renders the giving such notice as the statute requires unnecessary. The plaintiff proposed to prove by one of the commissioners that no notice was given to the plaintiffs, and that they did not appear; and this evidence was excluded on the ground that the recital in the judgment was conclusive of the fact that notices were given. This ruling may have been erroneous, and it is assigned as error; but it is not presented in the brief of counsel, and, under rule 29, must be regarded as abandoned. The judgment of condemnation in terms undertakes to vest the fee to the right of way and depot grounds in the railway company; but this the court had no power to do, and its judgment is in so far inoperative. Rev. St. art. 4206. The original

Pleading—
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taken.

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lands.

petition for condemnation is not found in the record, but the proceedings offered show that the lands condemned were fully and particularly described therein, and with reference thereto, the condemnation was made. This, with the plat, made a part of the judgment in this cause, in the absence of evidence to the contrary, must be presumed to describe the land condemned with sufficient certainty. When the land was condemned, the money was paid into court for the appellants, and it is urged that it was error to permit that fact to be proved. Such a payment, we are of the opinion, satisfies the constitutional requirement that "Compensation shall be first made or secured by a deposit of money" (Const. art. 1, § 17), and there was no error in permitting that fact to be proved. The steps taken in the attempt to condemn the land may not have been in accordance with the laws regulating such procedure, and we do not pass upon any question that might be raised in the cause, other than such as the plaintiffs present in the assignments of error relied on in their brief. The district court had the power to determine that the land had been condemned to the use of the railway company, and we would not be authorized to inquire whether its finding that it had been so condemned was erroneous on grounds not relied on by the plaintiffs. An issue was made as to the rights of the respective parties, and evidence heard as to the extent of the compensation the plaintiffs were entitled to receive from the railway company, and it is not clear, when the plaintiffs did not object to the trial of such an issue in this cause, that that the judgment herein rendered would not vest in the railway company the right to use the way and depot grounds, even if there had not been a previous condemnation. No such right could be established in an action of this character if a plaintiff objected. There is no error pointed out in the assignments of error presented in the brief, and under the agreement, filed the judgment will be affirmed.

Eminent Domain—Condemnation Proceedings—Petition—Description of Premises.—A petition for the condemnation of lands must allege that the taking is necessary for public use,—see *Smith v. Chicago & W. I. R. Co.*, 105 Ill. 511; s. c., 14 Am. & Eng. R. R. Cas. 384; *Atchison & D. R. Co. v. Lyon*, 24 Kan. 744; s. c., 5 Am. & Eng. R. R. Cas. 295; *Grand Rapids N. & L. S. R. Co. v. Van Drile*, 24 Mich. 409; *Valley R. C. v. Bohn*, 34 Ohio St. 114; s. c., 21 Am. Ry. Rep. 30; *Schick v. Pennsylvania R. Co.*, 1 Pearson (Pa.), 259; *South Carolina R. Co. v. Blake*, 9 Rich. (S. C.) L. 22,—and must set out the corporate existence and right to exercise the power of eminent domain. See *Atkinson v. Marietta & C. R. Co.*, 15 Ohio St. 21. Some of the cases hold that it is necessary for the petition to set out inability to acquire the lands by purchase or voluntary grant. See *Bowman v. Venice & C. R. Co.*, 102 Ill. 454; s. c., 14 Am. & Eng. R. R. Cas. 338; *Booker v. Venice & C. R. Co.*, 101 Ill. 333; s. c., 5 Am. & Eng. R. R. Cas. 357; *Chicago & M. L. S. R. Co. v. Sanford*, 23 Mich. 418; *Cunningham v. Pacific R. Co.*, 61 Mo. 35; *Hannibal & St. Joe R. Co. v. Munder*, 49

Mo. 165; *In re* New York C. & H. R. R. Co., 67 Barb. (N. Y.) 426; United States *v.* Oregon R. & Nav. Co., 9 Sawy. C. C. 61; s. c., 16 Fed. Rep. 524.

A complaint, in an action to condemn lands for public use, must be in writing.—*Church v. Grand Rapids & I. R. Co.*, 70 Ind. 161; s. c., 3 Am. & Eng. R. R. Cas. 198,—and should be verified. *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100. The petition or complaint should set out the names of the owners,—see *California S. R. Co. v. Colton L. & W. Co.* (Cal.), 14 Am. & Eng. R. R. Cas. 194,—and also the extent of the lands intended to be condemned. *Spofford v. Bucksport & B. R. Co.*, 66 Me. 26; *Chicago, M. & L. S. R. Co. v. Sanford*, 23 Mich. 418; *In re* New York C. & H. R. R. Co., 70 N. Y. 191; s. c., 18 N. E. Rep. 395; *Pennsylvania R. Co. v. Porter*, 29 Pa. St. 165; *Ohio R. R. Co. v. Harness*, 24 W. Va. 511; s. c., 20 Am. & Eng. R. R. Cas. 405. But there need not be an allegation as to the value of the lands sought for compensation. *United States v. Oregon R. & Nav. Co.*, 16 Fed. Rep. 524; s. c., 14 Am. & Eng. R. R. Cas. 23.

The petition for the compensation of lands should so describe the premises intended to be taken that there can be no question as to their identity. See *Toledo, A. A. & N. M. R. Co. v. Munson*, 57 Mich. 42; s. c., 20 Am. & Eng. R. R. Cas. 410; *Chicago & M. L. S. R. Co. v. Sanford*, 23 Mich. 418; *West v. West & E. R. Co.*, 61 Miss. 536; s. c., 20 Am. & Eng. R. R. Cas. 402; *Pennsylvania R. Co. v. Porter*, 29 Pa. St. 165; *Hussner v. Brooklyn City R. Co.*, 96 N. Y. 18; s. c., *sub. nom.* *Brooklyn City R. Co. v. Hussner*, 20 Am. & Eng. R. R. Cas. 265; *In re* New York C. & H. R. R. Co., 90 N. Y. 342; *Ohio R. R. Co. v. Harness*, 24 W. Va. 511; s. c., 20 Am. & Eng. R. R. Cas. 405.

Same—Filing.—In the case of *Ellisworth M. N. & S. E. R. Co. v. Maxwell*, decided July 7, 1888, the supreme court of Kansas say: "It would have been better practice for Maxwell to have filed a petition; but as no motion was made to compel him to do so, the omission could not be raised on an objection to the evidence." Following *Railway Co. v. Orr*, 8 Kan. 419.

DUDLEY

v.

MINNESOTA AND NORTHWESTERN R. CO.

(*Iowa Supreme Court, May 14, 1889.*)

Eminent Domain—Description of Premises—Damage to Entire Farm.—Where a land-owner whose farm is crossed by the right of way of a railroad asks for all the damages legally resulting from the appropriation, the damage to his entire farm may be considered in estimating damages, although the application for assessment of damages describes the premises as those crossed by the right of way, and, in the land-owner's notice of appeal from the award, the premises are described as in the application.

Same—Elements of Damage—Inconveniences.—In an action by a railroad company to appropriate a right of way across a farm, the court instructed the jury that mere inconveniences resulting from the location of the road were not of themselves to be considered, but that the jury were to consider

them for their bearing on the market price of the farm; the necessity of opening gates and crossing the railroad, and the danger of fire, being referred to as instances. *Held*, that the instruction was correct.

Same—Proof of Value—Assessment Rolls—Assessor's Opinion.—Assessment rolls cannot be introduced in evidence to prove assessed value of land sought to be appropriated by a railroad for its right of way. The opinion of the assessor as to the value of the land must be given under oath as a witness.

Same—Excessive Damages.—A verdict for \$1700 cannot be considered excessive where several witnesses testify that in their opinion the farm, consisting of 313 acres, was depreciated \$10 per acre.

APPEAL from District Court, Fayette County.

Proceedings for the assessment of damages for the establishment of defendant's right of way. Defendant appeals.

Fouke & Lyon and *Lusk & Bunn* for appellants.

Ainsworth & Hobson and *Hoyt & Hancock* for appellee.

GRANGER, J.—The sheriff's jury, to assess the damage for the location of the right of way over plaintiff's land, was summoned at the instance of the defendant. The application is for appraisers to assess the damages "for a one-hundred-foot right of way in and over the following described tracts or parcels of land, . . . to wit: The N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$" The application then directs the sheriff to "appoint six freeholders of the county," etc., "to assess the damage which the said Dudley will sustain by the appropriation of said right of way." The language in the notice of appeal is that he appeals "from the award and assessment of damages, . . . sustained by reason of the location and construction of the railroad over and across the following-described real estate:" (then describing the same land as in the application).

1. The land described is 120 acres, and the plaintiff's farm consists of 318 acres; and on the trial the plaintiff was allowed to prove the damage to the entire farm, and the defendant assigns that as error, and insists that the inquiry should have been limited to the premises described in the notice of appeal. It is to be noticed that neither the application by defendant for the assessment, nor the notice of appeal by plaintiff, in any manner indicates that there is to be an assessment of damages only to the premises described; but in the application for an assessment the premises are described as those crossed by the right of way, and the damages are such as he will "sustain by the appropriation of the right of way." The premises from which the right of way is taken are described, and the damages legitimately resulting therefrom are to be assessed. It is from such an assessment that the plaintiff appealed to the district court.

The case is stronger against appellants than *Cox v. R. Co.*, 41

Description of
property—
Damage to en-
tire farm.

N. W. Rep. 475. It is unnecessary to refer to the many authorities bearing upon the right of assessment in such cases, as the plaintiff, by his application, has asked for all damages legally resulting from the appropriations; and, when a farm is crossed on a right of way, that the damage to the entire farm may be considered in estimating damages, is hardly an open question in this state. There is nothing in the case of *Ball v. Railroad Co.*, 32 N. W. Rep. 354, not in harmony with this holding. It is not held therein that all the land damaged must be described in the papers in such cases. In commenting on the testimony, some language is used as to certain lands not being described in the papers. It is used evidently more with reference to the confused state of the record than otherwise, as it seems some of the land was not traceable to any definite location.

2. Complaint is made of the seventh instruction given by the court in these words: "You will notice that your inquiry is not confined to the three forties actually crossed by the railroad, but you are required to ascertain from the Same. evidence the damages which the plaintiff will sustain in consequence of this appropriation." It is in harmony with the rule herein announced as to the admission of testimony, and is correct.

3. The eleventh and twelfth instructions given by the court are claimed to be erroneous, and are as follows: "(11) So, in seeking the value of this farm immediately after the right of way was taken, you will consider not only Damages—Inconveniences—Destruction. the opinion of witnesses, but the facts upon which a just opinion ought to be based. You will consider not only the loss of the land actually taken, but the condition in which the farm was left after the appropriation, and every inconvenience naturally resulting from such appropriation by which the market value of the farm was then unfavorably affected. I need not enumerate these inconveniences in detail. You are not to allow damages for these inconveniences as such, but you are to consider them for their bearing, and only for their bearing, on the market value of the farm to which such inconveniences are attached. To illustrate: If you find among these inconveniences the necessity of opening gates and crossing the railroad often in conducting the operations of the farm, you will not attempt to estimate the damages resulting from this inconvenience, and make this estimate a part of your assessment; but in estimating the fair value of the farm, you will look at the farm with this inconvenience attached, and give it due weight in making this estimate. (12) You cannot assume that the owner of this farm will some time be injured by fire in consequence of defendant's negligence, and you cannot assess damages on this account: but if you believe the necessary dan-

ger from fire in operating the defendant's trains over this farm is a fact which would tend to depreciate the value of such farm, then this danger from fire may be considered with other things in seeking the value of this farm immediately after the appropriation. The same method of investigation will guide you in considering every inconvenience that can be properly considered by you."

It is urged that the eleventh instruction is in conflict with the rule laid down in *Lance v. R. Co.*, 57 Iowa, 636; s. c., 5 Am. & Eng. R. R. Cas. 617. The comments of the court in that case, when carefully read, do not support the conclusion placed on them by appellant. It is not therein held that, in so far as the location of the road would lessen the market value of the farm on account of danger from fire or other causes, it could not be considered. It is there stated that "The evidence as to continual danger from fires set out by the engines used in operating the road was incompetent, because mere matter of opinion," etc. The court say: "It was incompetent to show the situation of the grove and buildings, and the jury were as well qualified as the witnesses to determine the probable effect upon the property by the operation of the road." The idea in that case was that the testimony admitted would lead to improper results; but the spirit of the reasoning is in harmony with the instructions given in this case. We think the law as stated in both instructions correct and very fairly given.

4. The defendant offered to prove the assessed valuation of the lands for the years 1885 and 1886, and the testimony was excluded by the court—and appellant says this was error. The argument is that the assessor would certainly be a competent man to give an opinion on such values, and that the testimony as to value was based on opinion. It is true the assessor may have been a very competent man to give testimony as to the value of the farm, but the objection was not to him, but to a written statement of his. If he had been offered as other witnesses who gave their opinions, and subject to cross-examination, we might have a different record. We know of no authority or reason for admitting the assessment roll as evidence of value between third parties.

5. It is urged that the verdict is excessive. The jury allowed \$1700 damages to a farm of 318 acres. Quite a number of witnesses fix the value of the farm at \$10 per acre less after the location of the road, which would fix the damage at \$3180. Considering all the testimony, we think the verdict of the jury very conservative and free from prejudice. They were required to be governed by the testimony as they believed it.

6. The court refused to the defendant a change of venue, but

Evidence as to
damages—Assessment rolls.

Excessive
damages

we see nothing in the record to show an abuse of discretion in that respect, and we should not interfere.

Affirmed.

Excessive Damages in Condemnation Proceedings.—In *Little Rock Junction R. Co. v. Woodruff*, 49 Ark. 381; s. c., 33 Am. & Eng. R. R. Cas. 169, the court were asked to grant a new trial on the ground that the damages awarded were excessive. The request was refused, the court saying: "This is a delicate duty in any case, and especially so in a case where the sole issue is one as to value. This is so peculiarly within the province of the jury, it is a matter in which we can act with so little intelligence or satisfaction, and there is so little of finality about any judgment we could render on this point, that nothing but an extreme case would justify our interference. If there was no evidence to support the verdict, we would not hesitate to exert our authority to set it aside. It must be very seldom, however, that the verdict is entirely unsupported by evidence in a case where there is but a single and simple issue submitted to the jury, as in this class of cases." See also *Clarke v. Chicago, K. & N. R. Co.*, 33 Am. & Eng. R. R. Cas. 156; *Calumet River R. Co. v. Moore*, 33 Ib. 180; *Whitely v. Mississippi Water-power & B. Co.*, and note, *infra*, p. 624-627.

Elements of Damage.—See *Dowd v. Mason City & Ft. D. R. Co.*, *infra*, 633, note, 637.

WABASH, ST. LOUIS AND PAC. R. CO.

v.

MCDUGAL.

(*Illinois Supreme Court*, Sept. 27, 1888.)

Railroads—Alteration of Embankment—Written Offer by Attorneys to Restore—Striking from Files.—Where a question of damages arises from the alteration of a railroad embankment, the written statement purporting to be an agreement to restore the embankment to its former condition, signed in the name of the company by its attorneys, is neither an amendment of the petition nor a proposed plan of construction, and may be stricken from the files.

Same—Temporary Structure—Evidence of Exclusion.—Where, in condemnation proceedings to procure additional lands, a cross-petition is filed alleging damages arising from alteration in the embankment of the road, an offer on the part of the company to show that the embankment, as at present constructed, was for temporary use until the company should decide upon a permanent plan of construction, is properly excluded.

Same—Flooding Lands—Force of Waters—Evidence.—Where, in such action, damages are claimed for overflowing lands by reason of openings in the embankment, evidence that a house and levees were carried away by water coming through such openings is inadmissible, as not a proper element of damages, but may be received as an illustration of the force of the water.

Same—Instruction—Error.—In such a case, where the defendants' levees were connected with the company's embankment before the opening in the same, an omission to instruct the jury that they should not take into consideration the fact that, but for said opening, defendants might maintain a levy by attaching the same to the railroad embankment, and use it as a part of such levy to protect their land from overflow, was error.

Eminent Domain—Condemnation—Measure of Damages.—In an original proceeding to condemn lands, the measure of damages is the difference between the value of the land as a whole before, and after, the construction of the road built according to the proposed plan.

Same—Damages—Allowance in Gross.—Where damages are allowed to several claimants, a verdict for the gross sum to all will not be set aside for irregularity. Following *Illinois Western Extension R. Co. v. Mayrand*, 93 Ill. 591; *Peoria, P. & J. R. Co. v. Peoria & S. R. Co.*, 66 Ill. 174.

ERROR to review a judgment of the Menard Circuit Court, against plaintiff on a new assessment of damages caused by reason of a change in the plan of construction, in a proceeding to condemn a right of way over defendants' land.

The facts are stated in the opinion.

G. B. Burnett for plaintiff in error.

N. W. Branson and *Edward Laning* for defendants in error.

WILKIN, J.—This is a condemnation proceeding by which plaintiff in error seeks to obtain a right of way over defendants' land. Before the filing of the petition, another com-

Facts. company had constructed and put in operation a railroad over the land sought to be condemned, which railroad plaintiff had purchased and was then operating. Defendants, by cross-petition, claimed damages for injury to adjacent lands, averring that the railroad divided a farm of about 500 acres diagonally, leaving 160 acres northeast, and the remainder southwest, thereof; that the grade of the roadbed acted as a dam against water flowing from the 160 acres, thus overflowing and submerging it; that, by reason of openings and bridges in the grade, the lands southwest thereof were washed, overflowed, etc.; and that, by inconvenience in passing from one part of said farm to another, caused by said grade and the operation of said railroad, all of said lands were damaged.

A trial on the original and this cross-petition resulted in a verdict and judgment for defendants for \$4134.50, from which plaintiff prosecuted a writ of error to this court. The case is reported in 6 West. Rep. 321; 118 Ill. 229.

On that hearing, the record showed that, at the time the road was built, the title to all the lands in question was in one Bennett, but that, after plaintiff became the owner of the road, and after defendants purchased the land of Bennett, a break some 350 feet in length in the embankment was caused by an overflow; and that, instead of refilling the same so as to restore the road-

bed to its original construction, plaintiff caused a bridge to be put in said opening, which it has since maintained. On that record, it was held that whatever damage was done to the lands described in the cross-petition, by reason of the original construction of the road, accrued to Bennett, and not the defendants, his subsequent grantees, as held in the court below; and for that reason the judgment was reversed. It was, however, there decided that, inasmuch as it appeared that a change in the plan of construction in the grade had been made after the title vested in defendants, they could recover for any increased damages caused by the change; and the cause was remanded for further proceedings in accordance with that decision.

Defendants thereupon filed an amended cross-petition, basing their entire claim for damage to lands not taken on the change. In it they aver ownership to all the lands described in the original cross-petition, and allege generally that it is injured by the alteration: but the specific claim is that so much of the same as lies below or southwest of the grade is thereby overflowed, covered with drift, etc.; that levees theretofore constructed thereon were washed out, and the building of others made impracticable. Plaintiff then filed a statement in writing, purporting to be an agreement on its part to restore the embankment to its original plan, and so maintain it. It was signed in plaintiff's name by the attorneys appearing for it on the trial. On defendants' motion, this paper was ordered stricken from the files.

The bill of exceptions shows that plaintiff made an offer of proof as follows: "We offer to prove that the structure put in the opening was put there temporarily until such time as it could be ascertained, from the action of the water there and the effect upon the surrounding country, as to what change should be made;" but the court held such proof incompetent.

Defendants were allowed to prove, over plaintiff's objection, that, by reason of the opening in the grade, a small house on the land below the grade was carried off by the water, and a levee built by them destroyed.

Witnesses on behalf of defendants having testified that, by reason of the change, the land below was flooded, and thereby damaged, they were asked by plaintiff's counsel, on cross-examination, if the change did not benefit the 160 acres above the grade; but an objection thereto was sustained. Plaintiff also offered to prove in rebuttal the same fact; but the evidence was held incompetent, and excluded. Afterwards, however, counsel for defendants withdrew the objection to this last proof; and the court then offered to allow the evidence, and gave counsel for plaintiff an opportunity to introduce it, but they declined. To each of the above rulings proper exceptions were taken.

The verdict is for a gross sum, and contains no description of

land to be taken or injured. The amount found by the jury is \$3570. Motion for a new trial being overruled, judgment was rendered on the verdict, and plaintiff again prosecutes its writ of error to this court.

The errors assigned are,—

Errors assigned.

1. The court erred in striking plaintiff's stipulation from the files.
2. The court erred in admitting improper testimony on behalf of defendants.
3. The court refused to admit proper testimony offered by plaintiff.
4. The court gave improper instructions at the instance of defendants.
5. The court refused to give proper instructions asked by plaintiff.
6. The court erred in overruling plaintiff's motion for a new trial.
7. The verdict of the jury is defective.

The paper denominated a stipulation was properly stricken from the files. It was not in any sense an amendment to the original petition as contained in argument, nor was it filed as such. It was not a plan or proposed plan of construction proper to be incorporated in the record; and therefore *Jacksonville & S. R. Co. v. Kidder*, 21 Ill. 131, and other like cases cited, have no application.

No argument or citation of authorities is needed to show that attorneys employed to represent the company on the trial could not bind it by their agreement as to the plan of constructing its road. It is not claimed that they were given any such special authority.

The evidence which plaintiff sought to introduce for the purpose, as is claimed, of showing that the opening was not intended to be permanent, was incompetent as offered, and the court ruled properly in excluding it. No offer was made to prove by proper evidence that the company intended to change the plan upon which the road is at present constructed. For anything appearing in the offer of proof the company may have intended, after ascertaining the action of the water, to leave it just as it now is, or even so change it as to increase the injury. Having built the bridge, and maintained it as a part of the structure of its road for nearly three years, and having filed its petition to condemn,—making no averment whatever of an intended or proposed change in the construction,—it was not competent for plaintiff to prove merely that it did not intend the opening to be and remain permanent. If it had amended its petition so as to properly aver that it proposed to readopt the original plan of

Evidence as to temporary use of embankment.

construction, and had supported it by the introduction of plans to be incorporated in the record, the question as to whether or not the opening should be treated as a permanent part of the construction would have been raised. On the present state of the pleadings no such issue is presented.

The evidence introduced by the defendants to prove an injury to their house and levees was calculated to lead the jury to believe that such injuries were proper elements of damages to be considered in making their verdict, and should therefore have been excluded. If the sole object of its introduction was to illustrate the force with which water passed through the opening, as is now contended, it should have been so limited when offered.

Injury to
houses and
levees—Evi-
dence.

There was manifest error in refusing to allow plaintiff to show that the alteration benefited the 160 acres above the grade. There is nothing, however, in the record to show that the testimony on that question could have been introduced as well after the objection was withdrawn as when it was first offered. Therefore if injury resulted to plaintiff for want of such evidence, it was self-imposed, and it cannot complain.

The question raised on the assignment of errors, as to giving and refusing instructions involves a decision as to the correctness of the rule adopted by the trial court for the measure of damages. The lands in question border on the Sangamon river, and are and always have been subject to frequent overflow. There is no proof as to their value immediately prior to the construction of the railroad; but it does appear that Bennett, the grantor of defendants, purchased the entire tract from the county, as overflowed land, for \$1000; and it is clear from all the proof that, without levees to protect it against the frequent freshets from the Sangamon river, it is of but little value. After defendants purchased, and before the break in the grade of the roadbed, they built a single line of levee from a point of high ground on the west, near the river, extending in an easterly direction to and connecting with the railroad embankment; whereby they effectually leveed 280 acres of that part of the farm situated below or southwest of the road.

Measure of
damages—
Value of land
Evidence—In-
structions.

On this trial, defendants confined their proof of damages to this 280 acres; and all the witnesses who make any estimate as to the amount of damages do so by giving their opinion as to the difference in value of that 280 acres before, and after the change complained of was made; or with the above-mentioned levee, and without it. For instance, the defendant Hamilton, in his evidence, says: "The fair market value of the land below this railway embankment, and within the line of our levee at the time the opening in the embankment was made, I think, is

\$25 an acre. After the opening was made, I do not think it was worth more than \$10 an acre. I figure this difference upon 280 acres, and the difference per acre was \$15." On cross-examination as to this estimate, he says: "I took into account the levee then, and its connection with the embankment, and our use of the embankment as a part of the levee."

While it is true that some of the witnesses speak of the increased force with which water is thrown upon the land below, and the impracticability of making levees with the opening in the grade, as elements of damages occasioned by the change, they make no estimate on that basis, nor do they furnish such facts as would enable a jury to do so, except on the theory adopted by Mr. Hamilton.

The court charged the jury, in the third and fourth instructions given on behalf of defendants, that "The proper measure of damages for land damaged but not taken is the difference between the market value of the land before, and after, the act of the railroad company which occasioned the damage;" that "The damages to be awarded to the defendants is the difference between the value of the land so damaged before, and the value of said land after, the break was made."

Plaintiff asked an instruction, numbered 6 in its series, which would, in effect, have informed the jury that in assessing defendants' damages they should not take into consideration the fact that, but for said opening, defendants might maintain a levee by attaching the same to the railroad embankment, and use it as a part of such levee to protect their land from overflow; but the court refused to give it. From the evidence, and the giving and refusing of the above-mentioned instructions, it is manifest that defendants were allowed to recover, not only for the injury to their land occasioned by the construction and operation of a railroad built on the plan adopted by the change, but for loss resulting to them from the removal of an improvement put on the land by the plaintiff, or the company from which it purchased. Something is said in the argument about a contract by which defendants had a right to use the railroad embankment as part of their levee; but there is no proof of an agreement between them and the plaintiff which would vest in them an interest in the embankment or a legal right to compel plaintiff to maintain it; nor did the law, in view of the circumstances under which it was built, give them as owners of the land any right of property therein. *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273; *Ellis v. Rock Island & Mercer County R. Co.*, 14 West. Rep. 372.

There is no claim on behalf of defendants that the change in construction was a wrongful or negligent act; and if there was there could be no recovery by them in this proceeding for such

wrong or negligence. It will be seen, by reference to the former opinion herein, that the case on this trial is to be treated simply as a proceeding for a reassessment of damages as to the land not taken but injured; and that the measure of defendants' damages is the increased or additional injury, if any, caused by the alteration. In an original proceeding to condemn, the measure of damage is the difference between the value of the land as a whole before, and after, the construction of the road built according to the plan proposed. *Chicago & P. R. Co. v. Francis*, 70 Ill. 238; *Page v. Chicago, M. & St. P. R. Co.*, Id. 329; *Eberhart v. Chicago & St. P. R. Co.*, Id. 347; *Dupuis v. Chicago & N. W. R. Co.*, 116 Ill. 98; 23 Am. & Eng. R. R. Cas. 93; *Chicago, B. & N. R. Co. v. Bowman*, 122 Ill. 595.

As to these lands, such damages accrued to Bennett as heretofore decided. If, after damages have been assessed or settled by agreement, a change in the plan of construction involving more damages is made, the owner may demand a new assessment as to such increased damages. *Mills Em. Dom.* 219.

To the same effect is the holding of the former decision herein.

The proper inquiry on this trial was whether or not the lands in question, as a whole, were damaged more by the railroad built on its present plan than they were as it was first constructed; and if they were, to determine the amount of such increased damages.

We think the giving of defendants' third and fourth instructions, and the refusal of plaintiff's sixth, was error.

The giving of defendants' first instruction was also error. By it the jury are, instructed that, if they find that the alleged change was made, and that by means thereof the lands of defendants below and adjoining the railroad were damaged, then the defendants are entitled to just compensation for the damages so done to their said land.

There is some evidence in the record tending to show that the 160 acres above the road was benefited by the change; yet this instruction takes the consideration of such benefits from the jury entirely, and confines their inquiry to the 280 acres which were damaged.

As already stated, and as will be seen from *Page v. Chicago, M. & St. P. R. Co.*, 70 Ill. 329, and other cases above cited, the measure of damages in such a proceeding, as to lands injured but not taken, is the difference in the value of the property as a whole before, and after, the construction of the road; and therefore, even if it had been proper to allow defendants damages for being deprived of the use of the embankment as a levee to the 280 acres, the benefits to other portions of the farm should have been considered in reduction of such damages. The amended

Benefits to
other portions
of farm.

cross-petition did not have the effect of confining the inquiry to the lands below the road, as counsel assume.

The trial below seems to have been conducted throughout as a proceeding in the nature of an action for damages resulting to the 280 acres by reason of a negligent or wrongful failure on the part of plaintiff to properly maintain its embankment, rather than a proceeding to ascertain just compensation under the eminent domain laws of this state.

Under the last assignment of error, it is insisted that the verdict is fatally defective because it finds a gross sum to be paid defendants, instead of compensation and damage separately, and in failing to describe the land.

The authorities cited in support of this position are not in point. They simply hold that the verdict in such proceedings must conform to the requirements of the law under which it is had.

We had nothing in our present statute requiring a more definite or specific finding by the jury than is here returned. The verdict is sustained by *Peoria, P. & J. R. Co. v. Peoria & S. R. Co.*, 66 Ill. 174, and *Illinois Western Extension R. Co. v. Mayrand*, 93 Ill. 591.

For the errors indicated, the judgment of the circuit court must be again reversed, and the cause remanded.

Eminent Domain—Surface Waters—Flooding Land.—See, *post*, *Bell's Exe's v. Norfolk S. R. Co.*, and note.

Same—Instruction.—An instruction that, in considering the compensation to be paid defendant, the jury should fix the actual cash market value of the land taken,—not the price at which it would sell under special or extraordinary circumstances, but its fair cash value if sold in the market for cash and not on time,—assuming that the owner was willing to sell and the purchaser to buy, is correct, and does not draw a distinction between the market value and the cash value. *Following Railway Co. v. Moore*, 15 N. E. Rep. 764, and *Kiernan v. Railway Co.*, 14 N. E. Rep. 18; *Brown v. Calumet R. Co.* (Ill.), 18 N. E. Rep. 283. See, *ante*, *Kansas City, C. & S. R. Co. v. Story*, and note.

Same—Damages—Measures of.—Where property is taken for public use, the measure of the damages or compensation to be paid to the owner is its market value. *Jones v. New Orleans & S. R. Co.*, 70 Ala. 227; s. c., 14 Am. & Eng. R. R. Cas. 217; *Little Rock & F. S. R. v. McGehee*, 41 Ark. 202; s. c., 20 Am. & Eng. R. R. Cas. 82; *St. Louis, A. & T. R. Co. v. Anderson*, 39 Ark. 167; s. c., 17 Am. & Eng. R. R. Cas. 97; *California S. R. v. Colton L. & W. R. (Cal.)*, 14 Am. & Eng. R. R. Cas. 194, affirmed on authority, *California Sou. v. Kimball*, 91 Cal. 90, no opinion; see 65 Cal. p. XIX.; *Chicago & E. R. Co. v. Jacobs*, 110 Ill. 414; s. c., 22 Am. & Eng. R. R. Cas. 97; *Jacksonville & S. E. R. v. Walsh*, 166 Ill. 253; s. c., 14 Am. & Eng. R. R. Cas. 245; *South Park Com. v. Dunlevy*, 91 Ill. 49; *St. Louis, V. & T. H. R. Co. v. Haller*, 82 Ill. 208; *Eberhart v. Chicago, M. & St. P. R. Co.*, 70 Ill. 347; *Chicago & P. R. v. Francis*, 70 Ill. 238; *Page v. Chicago, M. & St. P. R.*, 70 Ill. 324; *Lafayette, B. & M. R. Co. v. Winslow*, 66 Ill. 219; *Haslan v. Galena & S. W. R. Co.*, 64 Ill. 535; *Sidener v. Essex*, 22 Ind. 201; *Cummins v. Des Moines & St. L. R. Co.*, 63 Iowa 397; *Everett*

v. Union Pacific R., 59 Iowa 243; s. c., 10 Am. & Eng. R. R. Cas. 203; *Lance v. Chicago, M. & St. P. R.*, 57 Iowa, 636; s. c., 5 Am. & Eng. R. R. Cas. 617; *Henry v. Dubuque & Pac. R. Co.*, 2 Iowa, 288; *Cohen v. St. Louis, F. S. & W. R. Co.*, 34 Kan. 158; s. c., 55 Am. Rep. 242; 22 Am. & Eng. R. R. Cas. 116; *Bangor & P. R. v. McComb*, 60 Me. 290; *Lawrence v. Boston*, 119 Mass. 126; *Burt v. Brigham*, 117 Mass. 307; *Cobb v. Boston*, 112 Mass. 181; *Fall River Works v. Fall River*, 110 Mass. 428; *Edmunds v. City of Boston*, 108 Mass. 535; *Tufts v. Charlestown*, 70 Mass. (4 Gray) 537; *Davis v. Charles River R.*, 65 Mass. (11 Cush.) 506; *King v. Minneapolis Union R. Co.*, 32 Minn. 224; s. c., 17 Am. & Eng. R. R. Cas. 93; *Union Depot S. R. & T. C. of Stillwater v. Brunswick*, 31 Minn. 297; s. c., 47 Am. Rep. 789; s. c., 14 Am. & Eng. R. R. Cas. 233; *Robbins v. St. Paul, S. & T. F. R. Co.*, 22 Minn. 286; *Sherwood v. St. Paul & C. R.*, 21 Minn. 122; *St. Paul & S. R. v. Murphy*, 19 Minn. 500; *Warren v. First Div. St. P. & P. R.*, 18 Minn. 284; *Winona & St. Paul R. v. Denman*, 10 Minn. 267; *Freemont, E. & M. V. R. v. Whalen*, 11 Neb. 585; s. c., 5 Am. & Eng. R. R. Cas. 364; *Virginia & T. R. v. Elliott*, 5 Nev. 358; *Somerville & E. Co. v. Doughty*, 22 N. J. L. (2 Zab.) 495; *In re Utica C. & S. V. R.*, 56 Barb. (N. Y.) 456; *In re Union Village & J. R.*, 53 Barb. (N. Y.) 457; s. c., 35 How. (N. Y.) Pr. 420; *Canandaigua & N. F. R. v. Payne*, 16 Barb. (N. Y.) 273; *Troy & Boston R. v. Lee*, 13 Barb. (N. Y.) 169; *Hill v. Mohawk & H. R. Co.*, 5 Den. (N. Y.) 206; *Rochester & S. R. v. Budlong*, 6 How. (N. Y.) Pr. 467; *Black River M. R. Co. v. Barnard*, 9 Hun (N. Y.), 106; *People v. Mayor*, 2 Hun (N. Y.), 433; *In re Furman St.*, 17 Wend. (N. Y.) 649; *Pittsburgh, V. & C. R. Co. v. Rose*, 74 Pa. St. 362; *Delaware, L. & W. R. v. Burson*, 61 Pa. St. 369; *Harvey v. Lackawanna & B. R.*, 47 Pa. St. 428; *East Pennsylvania R. Co. v. Hiester*, 40 Pa. St. 53; *Watson v. Pittsburgh & C. R. Co.*, 37 Pa. St. 469; *Searle v. Lackawanna & B. R. Co.*, 33 Pa. St. 57; *Schuylkill Nav. Co. v. Thoburn*, 7 Serg. & R. (Pa.) 411; *Howard v. Providence*, 6 R. I. 514; *Memphis v. Bolton*, 9 Heisk. (Tenn.) 508; *Chicago & M. C. R. Co. v. Ritter* (Tex.), 10 Am. & Eng. R. R. Cas. 202; *Chapman v. Oshkosh & M. R. Co.*, 33 Wis. 629; *West v. Milwaukee, L. S. & W. R.*, 56 Wis. 318; s. c., 10 Am. & Eng. R. R. Cas. 415; *Driver v. Western Union R. Co.*, 32 Wis. 569; s. c., 14 Am. Rep. 726; *Neilson v. Chicago, M. & N. R. Co.*, 58 Wis. 164; s. c., 14 Am. & Eng. R. R. Cas. 239; *Patterson v. Mississippi & R. Boom Co.*, 3 Dill. C. C. 465; *Ontario & Q. R. v. Taylor*, 6 Ont. Rep. (Q. B. Div.) 338; s. c., 17 Am. & Eng. R. R. Cas. 100; *Penny v. Penny*, 37 L. J. Ch. 340.

Where There are Minerals.—In those cases where the land taken contains minerals, the measure of damages is the sum that would be taken for the land with the minerals in it simply, and not in prospective profits as to the price or value of the minerals if the minerals themselves had been taken. See *Stockton & C. R. Co. v. Galgiani*, 49 Cal. 139; *Searle v. Lackawanna & R. R. Co.*, 33 Pa. St. 57.

Where There are Improvements.—Where improvements have been made upon the land, the owner is not necessarily entitled to recover the cost of such improvements, but will only be entitled to their reasonable value. See *Jacksonville & S. E. R. Co. v. Walsh*, 106 Ill. 253; s. c., 44 Am. & Eng. R. R. Cas. 245; *Lafayette, B. & M. R. Co. v. Winslow*, 66 Ill. 219.

"Market value."—By the term "market value" is to be understood that price which the land or property would bring in the hands of a prudent seller at liberty to fix the time and the conditions of the sale. *Everett v. Union Pac. R. Co.*, 59 Iowa, 243; s. c., 10 Am. & Eng. R. R. Cas. 203; *Lawrence v. Boston*, 119 Mass. 126; *Somerville & E. R. Co. v. Doughty*, 22 N. J. L. (2 Zab.) 495; *Memphis v. Bolton*, 9 Heisk. (Tenn.) 508; *Patterson v. Mississippi & R. Boom Co.*, 3 Dill. C. C. 465. See also *Lance v. Chicago, M. & St. P. R. Co.*, 57 Iowa, 636; s. c., 5 Am. &

Eng. R. R. Cas. 617; Cobb *v.* Boston, 112 Mass. 181; Fall River Works *v.* Fall River, 110 Mass. 428; Davis *v.* Charles River R., 65 Mass. (11 Cush.) 506; Tufts *v.* Charlestown, 70 Mass. (4 Gray) 537; Fremont, E. & M. V. R. *v.* Whalen, 11 Neb. 585; s. c., 5 Am. & Eng. R. R. Cas. 364; Virginia & T. R. *v.* Elliott, 5 Nev. 358; Howard *v.* Providence, 6 R. I. 514; Chicago & M. C. R. *v.* Ritter (Tex.), 10 Am. & Eng. R. R. Cas. 202; West *v.* Milwaukee, L. S. & W. R., 56 Wis. 318; s. c., 10 Am. & Eng. R. R. Cas. 415; Penny *v.* Penny, 37 L. J. Ch. 340.

Special Uses.—Where property has an adaptability for, and has been improved with a design to the carrying on of a special business, which business enhances the value of the property, this fact may be considered in estimating the damages. Chicago & E. R. Co. *v.* Jacobs, 110 Ill. 414; s. c., 24 Am. & Eng. R. R. Cas. 97; Robb *v.* Maysville & M. S. L. R. Co., 3 Met. (Ky.) 117; Michigan Air Line R. Co. *v.* Barnes, 44 Mich. 222; King *v.* Minneapolis U. R. Co., 32 Minn. 224; s. c., 17 Am. & Eng. R. R. Cas. 93; Rice *v.* Milwaukee & St. P. R. Co., 27 Wis. 98.

In estimating the damages, the jury are not to be confined to the purposes to which the land is devoted; they may consider any purpose for which it is adapted, and which enters into and affects its market value. Little Rock & F. S. R. Co. *v.* McGehee, 41 Ark. 202; s. c., 20 Am. & Eng. R. R. Cas. 82; Selma R. & D. R. *v.* Keith, 53 Ga. 178; Young *v.* Harrison, 17 Ga. 30; Harrison *v.* Young, 9 Ga. 359; Haslan *v.* Galena & S. W. R., 64 Ill. 353; Bangor & P. R. Co. *v.* McComb, 60 Me. 290; Burt *v.* Wigglesworth, 117 Mass. 302; Eastern R. *v.* Boston & M. R., 111 Mass. 125; Boston & W. R. *v.* Old Colony R., 66 Mass. (12 Cush.) 605; King *v.* Minneapolis Union R. Co., 32 Minn. 224; s. c., 17 Am. & Eng. R. R. Cas. 93; Sherman *v.* St. Paul M. & M. R. Co., 30 Minn. 227; Brisbane *v.* St. Paul & S. C. R. Co., 23 Minn. 114; Mississippi River Bridge Co. *v.* King, 58 Mo. 491; Somerville & E. R. *v.* Doughty, 22 N. J. L. (2 Zab.) 495; *In re* Furman St., 17 Wend. (N. Y.) 649; Chenango & A. R. *v.* Braham, 79 Pa. St. 447; Dorian *v.* East Brandywine & W. R., 46 Pa. St. 520; Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364; s. c., 20 Am. & Eng. R. R. Cas. 225; Mississippi & R. Boom Co. *v.* Patterson, 98 U. S. (8 Otto) 403; bk. 25, L. ed. 206. See also Everett *v.* Union Pac. R. Co., 59 Iowa, 243; s. c., 10 Am. & Eng. R. R. Cas. 203.

Same—Allowance in Gross.—As to allowance in gross, see *ante*, Kansas City S. C. R. Co. *v.* Story, 584, and note, 587-9.

NORTHEASTERN NEBRASKA R. CO.

v.

FRAZIER *et al.*

(*Nebraska Supreme Court, November 28, 1888.*)

Petit Jury—Impanelling—Quashing Panel—Interest of Jury Commissioner.—Where the county commissioners select sixty names of persons proportionately from the several precincts of the county, from which the petit jurors are to be drawn by the clerk of the court, and the sheriff, etc., a motion to quash the panel, on the ground that one of the commissioners had an action pending in court to be determined by a jury should be over-

ruled in the absence of a showing of partiality or unfairness, or that any of the persons thus selected were favorable to such commissioner.

Trial—Venue in Civil Cases—Change of Venue.—An application for a change of venue in a civil action should be denied unless it is made to appear to the court that a fair and impartial trial cannot be had in the county where the action is pending. The fact that there are numerous persons in the county that are biased and prejudiced against a party to a suit will not justify a court in granting a change of venue on the application of such party if it appears that a fair and impartial jury can be had, and a fair trial had, therein.

Eminent Domain—Condemnation—Compensation—Rights of Joint Owners.—Where the interest in certain lands across which a right of way is sought by a railway company is in two persons, and, before the appraisal of damages takes place, but after the filing of the petition, one of such persons acquires the interest of the other, and the award is made to the former, he will be entitled to the full amount thereof.

Same—Damages—How Ascertained.—Where a number of tracts of land, as described by the government surveys, are used together as one farm or body of land, in determining the owners' damage, by reason of the location of a railway across one or more of the tracts, the injury to the whole farm or body of land should be considered.

Same—Amount of Damage—Province of Jury—Appeal—Review.—The question of the amount of damages sustained by a land-owner for a right of way condemned across his land is peculiarly of a local nature, proper to be determined by a jury of the county; and the supreme court ordinarily will not vacate or modify the verdict if it is based upon the testimony in the case.

Same—Instructions—Error.—It is not error for the court to refuse to give an instruction asked on behalf of the defendant, when it has already given the same, in substance, in its own instruction.

ERROR to District Court, Wayne County.

Action by William Frazier *et al.*, to recover damages for land condemned for right of way for the Northeastern Nebraska R. Co. Defendant brings error from a judgment in favor of plaintiffs.

H. C. Brome for plaintiff in error.

Northrop & Welch for defendants in error.

MAXWELL, J.—On the 11th day of June, 1886, plaintiff in error filed its petition in the county court of Wayne county for the appointment of commissioners to assess damages occasioned by the appropriation of lands in Wayne county for the right of way of said railroad. The petition showed the location of such railroad over and across the S. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, of section 6, township 26, range 3 E., of the sixth principal meridian: the legal title to this tract being, at the time of the filing of this petition, in the defendants in error William Frazier and James Frazier. The petition also showed the location of such railroad over and across the N. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 14, township 27, range 1 E. —being an 80-acre tract: the title to this land at the time of the

Facts.

filing of the petition being in the state of Nebraska, the defendants in error having at that time simply a leasehold interest. The petition also showed the location of the railroad over and across the S. W. $\frac{1}{4}$ of section 11, township 27, range 1 E.—this also being school land, defendants in error being lessees only; all of said tracts of land, except the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, of section 6, township 26, range 3 E., being wild, uncultivated prairie land. Notice having been given as provided by law, and commissioners having been appointed on the 23d day of June, 1886, the commissioners reported to the county judge their assessment of damages with respect to the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 14, township 27, range 1 E., being one of the tracts above referred to, at \$201.27; and on the 25th day of that month the commissioners assessed the damages occasioned by the location of such line of railroad over and across the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, of section 6, in township 26 N. of range E., at \$450; and on the 28th day of June of that year the commissioners assessed the damages upon another tract, to wit, the S. W. $\frac{1}{4}$ of section 11, township 27, range 1 E., at \$166.82. From these several awards of damages, both parties appealed to the district court of Wayne county. These appeals were afterwards, by consent of parties, consolidated, and pleadings filed. Up to the time of the trial, the record now presented consisted of two separate causes; but at the time of the trial, it appearing that these two separate causes were between the same parties, they were consolidated, and, by agreement of parties, tried as one case. When petitions were filed in these causes, the land-owners, who are defendants in error in this court, claimed to be the owners of certain other lands lying contiguous to the tracts referred to, and across which the railroad had been located, and claimed damages to such other tracts by reason of the location of the line of railroad across the tracks above referred to. The defendant railroad company, by motion in the district court, sought to require the land-owners to limit their claim for damages in the district court to the same lands for which damage had been claimed and allowed by the commissioners. This motion was overruled, to which ruling the defendant below excepted. Plaintiffs, by their amended petition, filed in the district court, allege that on the 11th day of June, 1886, being the date of the filing of the petition of the railroad company in the condemnation proceedings in the county court, plaintiffs were in possession of that portion of the premises known as school land, as lessees from the state of Nebraska. They further say that “on or about the 6th day of June, 1886, these plaintiffs applied to have the aforesaid lands appraised for the purpose of sale; whereupon the same were appraised as by law provided, plain-

tiff's lease therefor surrendered, and the same purchased by the said William Frazier and James A. Frazier, and plaintiffs now are the equitable owners thereof." The defendant railroad company, by answer, denied the title of plaintiffs to the land in question, alleging the legal title to be in the state of Nebraska; and claimed a compliance with the laws of the state of Nebraska with respect to the procedure necessary to obtain the right of way across land belonging to the state. To these answers no replies were filed; and upon the issues thus made, the cause was tried. At the trial, the defendant filed a motion to quash the regular panel of the petit jury for that term of court, so far as this case was concerned, for the reason that William Frazier, one of the plaintiffs in this case, was a county commissioner of Wayne county, and, as such county commissioner, had participated in the selection of the sixty names from whom the twenty-four members of the regular panel of the petit jurors were selected. This motion was supported by an affidavit and duly authenticated transcript of the proceedings of the board of county commissioners with reference to the selection of said sixty names, the facts not being disputed; which motion was overruled, to which ruling the railroad at the time excepted. Thereupon a motion was filed by the railroad company for a change of venue, this motion being supported by affidavits, and affidavits being filed on the part of plaintiffs against said motion. This motion was overruled, to which ruling the railroad company duly excepted. The jury returned a verdict in favor of plaintiffs, and against the railroad company, for \$2200.87, as follows:

"We assess the damages to which said plaintiffs are entitled by reason of the location, operation, and construction of said defendant railroad over and across the following tracts of land: The S. W. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of sec. 6, Tp. 26, R. 3, Wayne county, Neb., at the sum of \$1090.31. We assess the damages to which said plaintiffs are entitled by reason of the location, construction, and operations of the defendant's railroad over and across the following tracts of land, to wit: The N. E. $\frac{1}{4}$ of sec. 24, and the E. $\frac{1}{4}$ of sec. 14, and N. E. $\frac{1}{4}$ of sec. 23, all in Tp. 27, R. 1, in Wayne county, Neb., at the sum of \$603.46. We assess the damages to which said plaintiffs are entitled by reason of the location, construction, and operation of defendant's railroad over and across the following tract of land: E. $\frac{1}{2}$ of sec. 15, S. E. $\frac{1}{4}$ of sec. 10, and S. W. $\frac{1}{4}$ of sec. 11, all in Tp. 27, R. 1, in Wayne county, Neb., at the sum of \$507.10.

E. J. SHERMAN, Foreman."

A motion for a new trial was overruled, and judgment was rendered upon the verdict in favor of plaintiffs, and against the railway company, for \$2200.87, and costs.

1. The first objection is that the court erred in refusing to

quash the panel of the petit jury. This is placed upon the ground that William Frazier, one of the plaintiffs below, was a county commissioner of Wayne county, and, as such, with other commissioners of that court, selected the sixty names from which the twenty-four jurors were drawn. There is no claim that there was any attempt at partiality in the selection of the sixty persons selected, nor is it alleged that even one of the persons so selected was favorable to the plaintiffs below. Section 658 of the Code requires the commissioners, or any two of them, at stated times, to meet and select sixty persons possessing the qualifications of electors, etc., and, as nearly as may be, a proportionate number from each precinct of the county. The name of each person thus selected is to be written on a separate ticket, and the whole number of tickets placed in a box, and the clerk of the district court and sheriff, or their deputies, are required to meet together and draw by lot out of the box twenty-four names, and the persons whose names are drawn are to be the petit jurors. Section 665 provides that no person shall be summoned as a juror in any district court oftener than once in two years. It will thus be seen that the county commissioners merely select sixty names, duly apportioned to the different precincts of the county, of electors who have not served as jurors for the two years preceding. They do not draw the jury, and, with the right of challenge for cause and peremptory challenges of jurors, there is but little doubt that a fair jury can be obtained in every case. At least some prejudice should be shown to a party complaining; otherwise it will be error without prejudice. The proper course, however, where a member of a board of county commissioners has a cause pending, to be tried before a jury, drawn from the names selected by such board, is to take no part in the selection of such names, and have this fact appear upon the commissioner's record.

2. That the court erred in overruling the motion for a change of venue. This motion was supported by a number of affidavits in favor of the railroad company, and by counter-affidavits in favor of the plaintiffs below. The affidavits on behalf of the railroad company tend to show that there is a considerable number of persons in Wayne county smarting under grievances, either real or imaginary, against the railway company. The affidavits on behalf of the plaintiffs below clearly show that there is a very considerable portion of the people of Wayne county that have no hostility to the railway company such as would prevent the company having a fair trial. Section 61 of the code provides that "In all cases in which it shall be made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending, or

Impanelling
jury—Interest
of commis-
sioners.

Change of
venue.

where the judge is interested or has been of counsel in the case, or subject-matter thereof, or is related to either of the parties, or is otherwise disqualified to sit, the court may, on application of either party, change the place of trial to some adjoining county wherein such impartial trial can be had; but, if the objection be against all the counties of the district, then to the nearest county in the adjoining district." The fact that a number of persons in any particular county have bias or prejudice against a party to a suit will not justify a change of venue, against the objections of the adverse party, if, notwithstanding such bias and prejudice of such persons, a fair and impartial trial can be had in that county. In civil cases, it is rare that the people of a whole county become biased and prejudiced against a party to an action. The reason is, they ordinarily take but little interest in the controversy, hence have no feeling in the case. There is a marked difference in this respect between a civil and criminal case, particularly where the offence charged is an atrocious one. In the latter case, Rumor, with her thousand tongues, spreads the news far and wide, and ordinarily with such coloring as to cause those who hear or read to form an impression, or perhaps to become biased or prejudiced. But even then, unless the opinion is a fixed one, or formed from reading the evidence or hearing the witnesses testify, a person otherwise qualified will be a competent juror. A plaintiff, properly bringing an action in a county in which he resides, is entitled to have the cause tried in such county unless it is clear that a fair and impartial trial cannot be had therein. From the necessity of the case, the law, with certain exceptions, permits a railway company to select its route through the real estate of an individual. This is done because the public good requires that the rights of the land-owners shall be subservient to those of the public. The protest of the individual would be ineffectual to prevent the taking of the property, but the law throws around him the safeguard of compensation for the damages sustained by him. If the award of the commissioners is unsatisfactory to either party, then either may appeal to the district court. Such appeal, if possible, should be tried in the county where the land is situated. The principal question ordinarily is the amount of damages sustained. This question is to be determined from the testimony of experts,—that is, persons familiar with the value of the land,—and this may include farmers and others. The observation of this court, from the cases which have been brought before us, is that juries ordinarily do not adopt the highest or lowest estimate of witnesses, but seem to have endeavored to bring in just verdicts, nor did the jury in this case adopt the highest estimates of the witnesses. The showing for a change of venue was entirely insufficient, and the motion was properly

overruled. The record fails to show the examination of the persons called as jurors on their *voir dire*; hence we are to presume that such persons appeared to be fair-minded and unbiased.

3. It is claimed that the court erred in admitting evidence and instructing the jury on the theory that the plaintiffs were entitled to recover damages to the S. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 6, township 26, range 3 E., which the plaintiffs below, by supplemental petition, show they had purchased and paid for in full prior to the 20th of June, 1887. In *Railroad Co. v. Hays*, 15 Neb. 224; 18 N. W. Rep. 51, it was held that the valuation for property taken for right of way for a railroad should be made as of the time of the filing of the petition or the assessment of the damage to the land. In that case it was merely decided at what point of time the assessment should be made, the appraisement being made as soon as convenient after the filing of the petition. In condemnation proceedings, the object is to acquire the right of way over the land from all parties having an interest therein. If two persons have an interest, then the rights of both must be respected, and their damages assessed. If, while the proceeding is pending, one of the parties acquires all the interest of the other party, he may show that fact, and will then be entitled to all the compensation. The fact that one of the parties is the state can make no difference, as there is no claim that the railroad company has paid the state any part of the condemnation money, or is liable therefor. The objection, therefore, is not well taken.

4. The fourth objection is that the court erred in admitting evidence of damages to other tracts contiguous to but not embraced in the lands covered by petition in the condemnation proceedings, and not covered by the award of the commissioners. There are three plats in the record, showing the descriptions of land owned by the plaintiffs below. From one of these plats it appears that the railway runs for a considerable distance along a creek on the plaintiff's land, and completely cuts off access to water for stock on a large portion of one of said bodies of land. The rule is that, where a railroad runs through an entire tract, the landowner is entitled to all the damages which result to him from the taking. He is not limited to the lands described in the petition of the railroad company, nor the award of the commissioners, but may show the facts and circumstances, and direct effect upon his land accompanying or flowing from such appropriation. *Wilmes v. Railroad Co.*, 29 Minn. 242; *Sheldon v. Railway Co.*, 29 Minn. 318; *Ham v. Railway Co.*, 61 Iowa, 716. In other words, just compensation for real estate taken or damaged

Damages—How
ascertained.

entitles the owner of several descriptions, used as one farm or body of land, to compensation for injury to the whole, although the right of way extends across but one or two of the subdivisions. There is no error, therefore, in admitting this evidence.

5. The fifth objection is that the damages are excessive, and not warranted by the evidence. In *Clarke v. Railroad Co.*, 23 Neb. 616, and *Railway Co. v. Johnson*, 40 N. W. Rep. 134, it was held that the question of the amount of damages sustained by the land-owner for a right of way condemned across his land is peculiarly of a local nature, proper to be determined by a jury of the county; and that ordinarily where the verdict is based upon the testimony, this court will not vacate or modify it. That rule is applicable in this case, and we find no cause for vacating the verdict.

Damages not excessive.

6. The sixth ground of error is that the court erred in refusing to give to the jury instruction No. 1, asked by the plaintiff in error, which is as follows: "You are instructed that it is by law the duty of a railroad company to construct and maintain adequate crossings for all land-owners across whose lands such road runs; and the question of the character of adequacy of such crossings cannot be considered by you in making your estimate of damages in this case." The court, on its own motion, had previously instructed the jury that the statute requires railroad companies to provide suitable crossings at all public highways sufficient to prevent stock from getting upon such railroad, and with open gates or bars at all farm-crossings of such railroad for the use of the proprietor of the land adjoining such railroad: and the failure of the railroad company to provide such crossings is not a proper element of damages in this case. It will be seen that the court had given instructions on that point as favorable as the railway company was entitled to ask for. Some objection is made to the proof of damages as made by the commissioners, and which was submitted to the jury. The exact purpose of the introduction of this evidence is not apparent, but the error, if any, would seem to be in favor of the railway company, and not against it. Upon the whole case, it is evident that the plaintiffs below sustained heavy damages from the location of the railway company across their lands, and that the verdict of the jury is not excessive. The judgment of the district court is therefore affirmed. The other judges concur.

Instructions.

Eminent Domain—Right to Compensation.—In every case where private property is appropriated to public use under the power of eminent domain, it is requisite that there shall be some provision requiring the person or corporation taking such property to make due compensation therefor. See *Colton v. Rossi*, 9 Cal. 595; *Cushman v. Smith*, 34 Me. 247; *Connecticut R. Co. v. Commissioners of Franklin Co.*, 127 Mass. 50;

s. c., 34 Am. Rep. 338; *Boston & L. R. Co. v. Salem & L. R. Co.*, 68 Mass. 1; *Ash v. Cummings*, 50 N. H. 591; *Matter of Hamilton Ave.*, 14 Barb. (N. Y.) 405; *Matter of Flatbush Ave.*, 1 Barb. (N. Y.) 286; *University v. North Carolina R. Co.*, 76 N. C. 103; s. c., 22 Am. Rep. 671; *Hendrick v. Carolina Cent. R. Co.* (N. C.), 8 S. E. Rep. 236; *McClinton v. Pittsburg, F. W. & C. R. Co.*, 67 Pa. St. 404; *Sterling's Appeal*, 11 Pa. St. 35; s. c., 56 Am. Rep. 246; 12 Am. & Eng. Corp. Cas. 330; *Norris v. City of Waco*, 57 Tex. 635; *Bohlman v. Green Bay & S. R. Co.*, 30 Wis. 105; *Shepardson v. Milwaukee & B. R. Co.*, 6 Wis. 605; *Atlantic & Pac. Tel. Co. v. Chicago, R. I. & P. R. Co.*, 6 Biss. C. C. 158.

The supreme court of Pennsylvania held, in the recent case of *Quigley v. Pennsylvania S. V. R. Co.*, 15 Atl. Rep. 478, that damages may be recovered, in condemnation proceedings, for the removal of an embankment on which a private railroad siding leading to the owner's property was placed, though the embankment was above the even grade of an unopened street.

The supreme court of Kentucky said, in the case of *Asher v. Louisville & N. R. Co.*, 8 S. W. Rep. 854, that, under Const. Ky. art. 13, § 14, providing that "No man's property shall be taken or applied to public use without just compensation being previously made to him," a railroad company cannot obtain a writ of possession while an appeal from the verdict of the jury, awarding damages for land sought to be condemned, is still pending, by giving its bond; but such damages must first be paid in money before the owner can be deprived of his land.

Under the North Carolina statutes, a railroad company may enter on land and lay out the route for its road, and either the company or proprietors may apply by petition to the county court, which shall appoint five freeholders to assess damages to the owner of the land. In an action by the proprietor to set aside a deed of the right of way as induced by fraud, and for damages, the course prescribed by the statute was not followed, but the deed was set aside, and the jury was allowed to ascertain the value of the rights and privileges taken. *Held*, erroneous, the proceedings prescribed being exclusive; and, as no easement had been acquired, no damages could be awarded therefor; nor could damages be recovered for the act of entry on the premises, and constructing and using the road. *Allen v. Wilmington & W. R. Co.* (N. C.), 9 S. E. Rep. 4.

Same—Payment in Refunding Bonds—Effect on Appeal.—It is said, in the case of *Chicago, S. F. & C. R. Co. v. Phelps* (Ill.), 17 N. E. Rep. 769, that where damages are allowed a land-owner for land taken for the purposes of a railroad, and, in contemplation of an appeal, the company pays to the owner, through the clerk, the amount of such damages, conditioned that the same be refunded if the judgment be reversed on appeal, such payment is not a satisfaction of the judgment so as to defeat the appeal by the company.

KNOLL

v.

NEW YORK, CHICAGO AND ST. LOUIS R. CO.

(Pennsylvania Supreme Court, October 1, 1888.)

Eminent Domain—Railroads in Street—Damages—Estoppel.—A distributee of a decedent's estate, who has by agreement received damages deemed to be sustained by reason of building a railroad along a street adjacent to the lands of decedent, is estopped from claiming further damages for depreciation to the lands, by reason of such easement, and the administrator of such estate cannot make such claim in behalf of the distributee.

Same—Damages—Mortgaged Lands—Right of Action.—The right of action for damages arising from building a railroad in a public street adjacent to mortgaged lands is, in the absence of bad faith, in the owner in possession, and not in the mortgagee.

ERROR to Court of Common Pleas, Erie County.

The facts are stated in the opinion.

J. Wetmore for plaintiff in error.

Davenport & Griffith for defendant in error.

WILLIAMS, J.—This case is somewhat anomalous. The plaintiff is the holder of a mortgage upon a house and lot in the city of Erie. The defendant company, acting under the authority of the railroad laws of the commonwealth and an ordinance of the city of Erie, has built a single-track railroad along the centre of Nineteenth street, on which the mortgaged property fronts. The complaint of the plaintiff is that the value of the property has been depreciated by the building of the railroad along the street, and that his security as a mortgage creditor has been impaired to the same extent. No effort has been made to collect the debt or to bring the mortgaged premises to sale, so as to determine what amount could be realized out of it; but this suit is brought to recover in damages the amount of the alleged depreciation in the value of the property. From an examination of the testimony, we learn that the plaintiff is the administrator of W. Hermle, deceased, who died in 1872. At the time of his death, Hermle was the owner of the equitable title to the lot in question, and had erected the dwelling-house now standing on it. He left a widow to survive him, but, so far as the evidence informs us, no issue. Soon after his appointment as administrator, Knoll made his application to the orphans' court for leave to sell the house and lot at public sale for the payment of debts. Leave was

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granted, the sale made, and Mrs. Hermle, the widow, became the purchaser at the price of \$2000. She paid no part of the purchase-money, but gave her bond and mortgage for the amount of her bid; and this is the bond and mortgage which Knoll alleges is impaired in value by the act of the defendant in building its road along Nineteenth street. The mortgage was made in 1873, the railroad was located in 1881, and this suit was brought in 1887. Our first question is whether the amount due upon the mortgage is greater than the present value of the property bound by it after providing for a prior encumbrance. If it is not, the plaintiff has nothing of which to complain. The question is not whether the property is worth less than it was when the mortgage was taken, but whether it is worth less than the plaintiff's debt. It is the injury to him, not that sustained

Failure of
plaintiff to
show that se-
curity is im-
paired.

by the lot-owner, on which his right to recover must rest. It must be borne in mind that the plaintiff is a mere trustee. As administrator of W. Hermle, he holds this mortgage for those who may be entitled to the fund on final settlement of the estate; and these, after the lapse of 15 years, are presumably not creditors, but the heirs at law, of the descendant. In 1877, the plaintiff filed a partial account of his administration of the estate, from which it appears that the personal estate was appraised at \$69.80, and was retained by the widow as part of the amount allowed her as exempt from the claims of creditors. The decedent had no real estate except the house and lot now owned by his widow, and represented by plaintiff's mortgage. The account also shows that Mrs. Hermle had paid to apply on the mortgage, "in money and debts assigned to her," the sum of \$1350, with which the accountant charged himself. This left \$650 of the principal still due, with some interest. Whose was this balance? Out of it Mrs. Hermle was entitled to take the balance of her \$300 as of the date of the mortgage. This would take \$230 from the \$650, leaving only \$420 for distribution; and, in the absence or issue, one half of this balance would belong to her under the intestate laws. The amount to which the plaintiff would be entitled as administrator would be, in this manner, reduced to about \$200, a sum which, under the evidence, would be abundantly secure upon the property. As to Mrs. Hermle's interest in the mortgage, she is very clearly estopped from making any claim against the defendant, because she agreed with the defendant that the damages sustained by the property were \$200, and upon the payment of this sum to her she executed and delivered a release of all claims for damage by reason of the location of the railroad on Nineteenth street. As she could not now claim a larger sum than that agreed upon, Knoll cannot claim it for her, but must be regarded as the representative of

the other parties entitled to share in the fund. He fails to show, therefore, that his security has been impaired for the sum he is entitled to collect from Mrs. Hermle upon the mortgage; and for this reason alone, the court below was justified in withdrawing the case from the jury.

But while indicating a sufficient reason for affirming the judgment in this case, we have no inclination to avoid the consideration of the precise point on which the case turned in the court below, and which has been presented here with so much earnestness and zeal by the learned counsel for the plaintiff in error. Is the plaintiff, on the assumption that his security has been impaired, in a position to maintain this action against the company defendant? The title to the property injured is in Mrs. Hermle, the owner. The plaintiff is a mortgagee out of possession—a holder of an encumbrance upon the title merely. As a lien creditor, he has the right to prevent the depreciation of the property, bound by his judgment or mortgage, by the commission of waste thereon. If the owner, or a stranger to the title, attempts the removal or destruction of timber trees, of the minerals, or the buildings, he may interfere by writ of estrepement or injunction to prevent it; but subject to this right of the lien creditors to stay waste, the owner has, by virtue of his ownership, the *jus disponendi* of the property, including everything upon the surface or underlying it. He may lawfully sell his timber or his buildings, and, if the vendee is allowed to remove them, a good title will vest in him—provided always that the sale be fairly and honestly made. The creditor has the right to interpose, if he will; but if he does not do so, the severed articles pass out from under his lien when they pass beyond the lines of the property on which his lien rests. While on or affixed to the freehold, he may insist that they shall so remain; but if severed and removed, his right to them by virtue of his lien on the freehold is gone. Vigilance is the duty of a creditor. *Vigilantibus non dormientibus jura subveniunt.* But the injury complained of in this case is not waste. The defendant company has not entered upon the lot covered by the mortgage, or removed anything from it. It has entered upon a public highway in a lawful manner and in the exercise of the right of eminent domain. Its entry could not have been prevented by the plaintiff, nor its work arrested by a writ of estrepement or injunction. The plaintiff alleges that the value of the property bound by his lien has been diminished by the construction of the railroad. So it might have been by the erection of a factory or a tavern on a neighboring lot, or by a change in the use or occupancy of the buildings near it; but so long as there is no entry upon the lot bound by the lien, and no unlawful act done by the defendant,

Plaintiff's
right to main-
tain action.

the plaintiff has no ground on which to stand. The right of action for such consequential injuries is in the owner; and if the party exercising the right of eminent domain desires to make an amicable settlement for any damages done thereby, the owner residing on the land is the proper person to whom to apply. The injury is one done to the freehold as the result of the lawful act of another done beyond the lines of the injured property, and the owner of the freehold is the only person in whom a right of action for such an injury can reside. If the owner should refuse to move, or should act fraudulently, the courts, upon a proper application by lien creditors, would no doubt treat him as a trustee, and require him to do, or permit his creditors to do in his name, what might be necessary to an adjustment of the damages, and impound the money for those equitably entitled to receive it. In this case the owner has settled with the defendant and given a release of damages. There is no allegation that the settlement was secured by fraud on the part of the defendant, or made by the owner with a purpose to defraud the plaintiff. The plaintiff brings his suit upon a right of action which he alleges rests in him as a lien creditor. Notwithstanding the settlement and release by the owner, he claims to be entitled to recover his damages, as distinguished from the damages of the owner. The right of action asserted is not that of the owner of the property, but one independent of and additional to that which resides in the owner. If this position is tenable for the plaintiff, it would be equally so for any number of lien creditors of Mrs. Hermle. A settlement with or a recovery by one would not estop another from taking the chances of a more favorable verdict. To state the position is a sufficient argument against its soundness.

Perhaps the case that comes nearest to our question is *In re Road*, reported in 94 Pa. St. 126. A public road had been laid out over a farm in Montgomery county, of which Bissinger was owner, but upon which Nash held a purchase-money mortgage for \$10,000. Nash claimed to be entitled to the damages sustained by the opening of the road, as the holder of the mortgage. On the other hand, Bissinger, as owner, released them. The court of quarter sessions held the release of the owner effectual as an extinguishment of all claim for damages. The judgment was affirmed by this court, with a *per-curiam* opinion, in which the following paragraph occurs: "Nash might perhaps have brought his case on the record by a petition, with the necessary averments; but as it stands, we cannot take cognizance of the question he has attempted to raise." If by "necessary averments" Nash had shown to the court that Bissinger was acting in bad faith towards him, and was releasing the damages, not because the advantages resulting from the

Authorities
reviewed.

opening of the road were, in his opinion, equal to or greater than the disadvantages, but to prevent Nash from securing them to apply upon his mortgage, then it is probable that the court of quarter sessions would have entertained his petition, and made such order as to secure a fair ascertainment of the damages, and a proper appropriation of them. The claim asserted, however, would have been that of the owner; and the damages, when settled, would have been paid out under an order of the court. Action analogous to that now suggested has been taken in right-of-way cases whenever the courts have obtained control over the damages assessed, and distribution has been made on equitable principles. *Powell v. Whitaker*, 88 Pa. St. 445; *Workman v. Mifflin*, 30 Pa. St. 362. In these cases the courts seem to have regarded the owner as a trustee for his lien creditors, and a recovery in his name as one to be controlled for their benefit. In the case at bar, if appraisers had been appointed in lieu of the settlement made between the parties, they would have made report, not only fixing the amount of the damages, but stating the fact that the plaintiff was the holder of an unsatisfied mortgage, and recommending the money to be paid into court for the benefit of the parties entitled. If this had been done, the plaintiff might have asked that the money be paid to him upon his mortgage; but if the appraisers had made no mention of the mortgage, and their report had been approved, and the money paid to Mrs. Hermle without the intervention or objection of the plaintiff, such payment would have been, as to the defendant, a final disposition of the claim for damages. An agreement upon the amount of damages, made with the owner in good faith, followed by payment to and a release by him, is equally conclusive upon the claim. There was, it will be remembered, no entry upon the lot in controversy; no appropriation of any part of it, or of anything upon or affixed to it; and, as a settlement fairly made with the owner was, as we have seen, a final disposition of the claim for damages, it follows that the plaintiff has no further remedy. Had the road been located over any portion of this lot, and had the damages been settled by the parties or adjusted without notice to the plaintiff, it is probable that the lien of the mortgage would not be divested, and the mortgagee might in that case proceed upon his mortgage in the same manner as if a sale of part of the mortgaged premises had been made to a private person—selling first that which still belonged to the debtor, and, if his money was not made thereby, then selling that which the railroad company had taken. If such had been the situation, the plaintiff would have had two remedies at his command—one through the owner as a trustee of the title for his lien creditors; and one as mortgagee, to be made effective by process upon his

Settlement
conclusive on
mortgagee.

mortgage. In the case in hand, the plaintiff had the first of these remedies only, and that was extinguished by the settlement with and release by the owner. We conclude that the plaintiff's counsel entertained substantially this view of the case; for upon the trial he offered, and asked that his offer be entered upon the stenographer's notes of the trial, that the \$200, paid by the defendant to Mrs. Hermle, might be credited upon whatever sum the jury assess the damages to his client. This was a concession that the payment to the owner was satisfaction *pro tanto* of the damages sustained by the property. But if the payment to the owner was a satisfaction to any extent whatever, it was a satisfaction *in toto*. It was as broad as her right as owner; and as it concluded her, it must necessarily conclude all persons claiming through her. The court below was therefore right in the legal rule applied, and upon which the compulsory nonsuit was entered. Judgment affirmed.

STERRETT and CLARK, JJ., dissent.

Rights of Mortgagees in Eminent Domain Proceedings.—See Long Dock Co. v. Morris & E. R. Co., 30 Am. & Eng. R. R. Cas. 431, note, 435.

ESCH

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

(*Wisconsin Supreme Court, Sept. 18, 1888.*)

Eminent Domain—Compensation—Damages—Trial—Instruction.—In a proceeding to determine the damages arising from the appropriation of lands for railway purposes, a charge to the jury "that the market value is such a sum of money as the property was worth in the market to persons generally who would pay its just and full value" was not misleading, and conforms to the rule laid down in *Washburn v. Railway Co.*, 59 Wis. 364; 20 Am. & Eng. R. R. Cas. 225; *Watson v. Railway Co.*, 57 Wis. 332; 10 Am. & Eng. R. R. Cas. 168; *Snyder v. Railway Co.*, 25 Wis. 60.

Same—Damages—Where Part only is Taken.—In assessing the damages arising from the appropriation of a part of a lot of land, where the value of the strip taken as part of the whole lot, and as a parcel of the same, is added to the damage to the balance of the lot not taken, the rule of assessment as approved in the case of *Watson v. Railway Co.*, 57 Wis. 332; 10 Am. & Eng. R. R. Cas. 168, is complied with.

Same—Assessment of Damages—Conveyance of Adjoining Lands.—In the assessment of damages for the appropriation of land, for railroad purposes,

conveyances of adjoining lands without proof of their actual consideration are incompetent.

APPEAL from Circuit Court, Milwaukee County.

The facts are sufficiently set forth in the opinion.

Flanders & Bottum for appellant.

John W. Cary and *J. T. Fish* for respondent.

· COLE, C.J.—The appellant was the owner of lot 10 in block 86 in the city of Milwaukee, being a parcel of land 50 feet on the east side of Second street and 150 feet deep, lying between Clybourn and Fowler streets. The defendant company condemned for depot purposes 55 feet average width off the rear end of the lot, leaving it 50 by 95 feet, upon which there were buildings. The plaintiff appealed from the award of the commissioners, and in the circuit court recovered less damages than had been awarded him. The issue on the trial was of course the value of the strip taken, and the damage to the residue of the lot resulting from such strip being taken by the company. Errors are assigned to various rulings of the court on the trial, some of which will be noticed.

Case stated.

It is said the court erred in permitting several witnesses to testify, against the plaintiff's objection, to the value of the strip taken separate and apart from the residue of the lot.

This would be a serious error were it sustained by the record; but we think it is not. On the contrary, we are satisfied that all the witnesses well understood that they were to estimate the value of the strip which was taken, considered with reference to the entire lot, and as a part thereof. It would be easy to verify this remark by citing answers to questions put to the witnesses; but it is deemed unnecessary. A number of exceptions are taken to the charge of the court in respect to the rule of damages. The charge is too long to be quoted entire, but the court, in substance, told the jury that they were to find what was the market value of the strip of land taken, at the time it was taken, as a part and parcel of the lot of which it was a part, and also what was the damage to the market value of the residue of the lot in consequence of such strip being taken for the use of the company. The learned circuit judge stated that these were the only questions which the jury were to consider; that the law did not provide for compensating the owner of the lot for losses in his business, but was confined to giving him compensation for the strip actually taken, and the damage to the market value of the residue of the lot. The judge further added: "Market value is such a sum of money as the property was worth in the market to persons generally who would pay its

Value of strip considered with reference to entire lot.

Rule of damages—Market value of land.

just and full value" at the time when taken. This language of the court is criticised, and it is said it is equivalent to telling the jury that the market value of the strip taken, and of the residue of the lot, was what they were worth in the market generally, which, it is said, did not afford a true test of the amount of compensation to which the plaintiff was entitled. The plaintiff was certainly entitled to just compensation for his property taken; and we universally arrive at the amount of this compensation by estimating the value of the property in money. This is its exchangeable value; and what property will bring in the market is resorted to as a means of ascertaining its true value, or the amount of compensation the owner should receive. This is sufficiently accurate for the practical affairs of life, whether the market value is the true value or not. Now, the court told the jury they must assess the plaintiff's damages, for the strip taken at the sum of money which it was worth in the market to persons who would pay its just and full value. The full and fair market value means what the property is worth or will sell for as between one who wants to purchase and one who wants to sell. This is what is understood by the words "market value"—what it is worth or what it will sell for in the market; and, as to the damages to the residue of the lot, with the improvements on it, the court said it was to be estimated at what the property was worth in the market to persons who would pay its just and full value at the time the strip was taken. The judge said, in this connection, whether it was inconvenient for the plaintiff to part with that particular piece of property, or whether it was necessary for the company to have it for depot purposes, were not proper matters to be considered in arriving at the value and injury suffered. It is insisted that the plaintiff was entitled to the value of the property for any use to which it might be applied, and for which it would sell in the market. There is nothing in the charge, when fairly considered, in conflict with such a rule. The market value, or what the property was worth to a person who would pay its just and full value, would certainly not exclude from the consideration of the jury the use to which the property was put by the owner, nor any reasonable use to which it could be applied by a prudent and discreet man in the immediate future. Consequently we do not think the jury could have been misled by the words "market value" as used in the charge, but that the charge, taken together, was sufficiently accurate, and conformed substantially to the rule of this court as laid down in *Snyder v. Railway Co.*, 25 Wis. 60; *Watson v. Railway Co.*, 57 Wis. 332; 10 Am. & Eng. R. R. Cas. 168; *Washburn v. Railway Co.*, 59 Wis. 364; 20 Am. & Eng. R. R. Cas. 225, and other cases. The jury must have understood, from the instructions given, that the plaintiff was entitled to a just com-

compensation for his property taken and the injury done him, which was to be ascertained from the evidence as to what the property would sell for or was worth in the market before the strip was taken, and after such strip was taken. In estimating this value and damage, the jury would necessarily determine what the property was fairly worth in the market before the strip was taken, and what it is worth after the company had taken the strip for depot purposes. We do not think it was necessary to state the rules for determining the value with any greater particularity to guide the jury. When the jury, in obedience to the instructions given, assessed the value of the strip taken as a part of the whole lot, and as a parcel of the same, and determined the damage suffered by the plaintiff by reason of the taking to the balance of the lot not taken, these two amounts, added together, would give the plaintiff's compensation precisely, as the rule was laid down by the trial court in the Watson Case, which was approved by this court. See 57 Wis. 357; 10 Am. & Eng. R. R. Cas. 168 *et seq.* In order to prove the value of the premises, the plaintiff offered in evidence, and the court admitted the same against the defendant's objection, the conveyances of a number of other lots in the neighborhood. As to some of these conveyances, we do not understand that any evidence was offered or given as to the actual consideration paid, or that it was even shown that the lots themselves were similarly situated, or were of like condition to the plaintiff's lot. When the defendant came to its defence, its counsel offered in evidence a deed, from F. W. Friese and wife to C. D. Kendrick, of the south half of lot 9 in block 75. This was objected to by plaintiff's counsel, although he had introduced precisely the same kind of testimony to prove his case. But the objection was overruled and the deed admitted in evidence. No proof was given of the actual consideration paid; and the deed was incompetent evidence under the decision in *Seefeld v. Railway Co.*, 67 Wis. 96; 27 Am. & Eng. R. R. Cas. 428, where this point is ruled. It is impossible to tell what effect this improper testimony had upon the minds of the jury in arriving at their verdict. There is no way to sustain the judgment except upon the ground that, as the plaintiff himself first introduced this class of testimony, he is not permitted to object to the error when committed in favor of the other side. But we know of no rule of practice which will warrant us in holding that an error on one side counterbalances or destroys a like error on the other side. We are therefore compelled to reverse the judgment for the admission of this improper testimony. The only doubt we have had upon this point arises from the statement in the bill of exceptions that the defendant excepted, to the ruling of the court admitting the deed,

Same—Taking part of tract.

Same—Sales of other land.

instead of the plaintiff. But to suppose that the defendant took an exception to a ruling of the court in its favor, admitting evidence offered by its own counsel, would be to indulge in a supposition too absurd and preposterous to be entertained. We must presume that there is a clerical mistake in the record in writing the word "defendant" instead of "plaintiff." But we deem the error fatal, and order a new trial on that ground. The judgment of the circuit court is reversed, and a new trial ordered.

Eminent Domain—Measure of Damages—Market Value.—As to the measure of damages and market value of the land taken, see, *ante*, *Wabash, St. L. & P. R. Co. v. McDougal*, and note; see also *Little Rock, etc., R. Co. v. Woodruff*, 33 Am. & Eng. R. R. Cas. 169, note, 178, where the cases are collected.

Same—Trial—Order of Evidence.—At the trial of an issue to determine the compensation to the owner, for land taken for a railroad, the company, being plaintiff, offered evidence only of the damages to the land taken, and rested. The owner then offered evidence to show the damages both to the land taken and the residue. *Held*, that the company could, on rebuttal, introduce evidence tending to show that the residue of the land was not damaged, as it was not competent, in chief, to assume a damage and then prove a negative. *Chicago, S. F. & C. R. Co. v. Phelps (Ill.)*, 14 N. E. Rep. 769.

Same—Instructions.—An instruction of the court proceeded on the idea of a vesting in defendant of an interest in the land as a right of way over it, and directed the jury to ascertain, as the measure of value, "the difference between what the whole property would have sold for unaffected by the road, and what it would have sold for as injured (if it was injured) by the construction of the road." *Held*, that, as the plaintiff's complaint did not propose to transfer to defendant any interest in land, or easement therein, on payment of damages, it was error to instruct on the measure of damages for the right of way. *Allen v. Wilmington & W. R. Co. (N. C.)*, 9 S. E. Rep. 4.

WHITELY

v.

MISSISSIPPI WATER-POWER AND BOOM CO.

(*Supreme Court of Minnesota, June 15, 1888.*)

New Trial—Excessive Damages—Discretion of Court.—Upon an examination of the record, it is held that the question of the propriety of granting a new trial in this case, on the ground that the verdict was not justified by the evidence, was within the discretion of the trial court.

Appeal—Review—Impeaching Verdict.—A party who appeals from an order setting aside a verdict and granting a new trial cannot in the appellate court impeach the verdict, or be heard upon exceptions taken by him to rulings on the trial which terminated in such verdict.

Eminent Domain—Submission to Jurisdiction—Waiver to Objections.—Where a land-owner appears before commissioners in condemnation proceedings, appointed upon petition duly filed, and is heard in respect to his damages, and thereafter appeals from their award, he will be deemed to have submitted to the jurisdiction of the court, and to have waived irregularities in the proceedings for the appointment of the commissioners.

Same—Assessing Damages—Benefits.—In considering benefits to that portion of an entire tract under such proceedings, only such as result directly and peculiarly to the particular tract are to be allowed.

APPEAL from District Court, Crow Wing County.

Leon E. Lum for Whitely, appellant.

G. S. Fernald and *E. N. Donaldson* for Mississippi Water-power & Boom Co., respondents.

VANDERBURGH, J.—These proceedings were instituted for the condemnation of certain lands of the plaintiff, appellant, lying in the county of Crow Wing, found necessary to be appropriated for the corporate use and purposes of the respondent company. The plaintiff appealed from the award of the commissioners appointed to appraise damages to the district court, where a reassessment by the jury resulted in a large increase in the amount awarded. A new trial was granted upon defendant's application, and against the objection of the plaintiff, on the ground chiefly that the verdict was not, in the judgment of the trial court, fairly justified by the evidence. From the order granting a new trial, the plaintiff appeals to this court. We are, then, to consider on this appeal the grounds upon which the motion for a new trial was granted by the trial court; and the appellant, who is here defending the verdict and opposing any new trial, is not entitled to be heard in respect to adverse rulings claimed to be erroneous and prejudicial to him, occurring on the trial which culminated in such verdict. After an examination of all the evidence, we are of the opinion that the question of the propriety of granting a new trial upon the ground stated was within the sound discretion of the trial court, and that this court should not interfere. The proposed improvement will cause a large portion of plaintiff's land to be overflowed. It is claimed by him to be very valuable as meadow-land, and it was owned and occupied by him with other lands as one tract or parcel, and was so treated on the trial. There was a wide range in the testimony of the witnesses, and great diversity of opinion in respect to the market value of the land taken. Evidence of the productiveness of the meadow, and the quality of the grass, and the situation and character of the land (upon which the witnesses also differed), was proper and material to enable the jury the better to estimate the value, and apply other evidence, including the opinions of witnesses testifying as to the market value. It can hardly be

Case stated.

New trial—
Verdict con-
trary to evi-
dence.

said that the evidence so preponderates in favor of the verdict as to warrant us in reversing the trial court. The court was of the opinion that the jury must have been unduly influenced by the testimony as to the amount and price of the hay produced upon the land, as against the evidence as to its market price or value, and that, upon a comparison and examination of all the evidence, the damages allowed were too large. We see nothing in the state of the record that warrants us in saying that the court was wrong in taking this view of the evidence on the motion for a new trial.

The court also states, as a further ground for its decision, that the jury did not give due weight "to the evidence of the benefits of the land adjoining the overflow." It does not appear, however, that this reason was controlling, nor are we able certainly to conclude, from the record, that the court adopted a wrong rule in applying the evidence in relation to the allowance of benefits. But in view of another trial, we ought to express our opinion on this and one or two other questions likely to again arise. The plaintiff, if he had asked therefor, was undoubtedly entitled to more explicit instructions, defining the rule on the subject of benefits, applicable to this class of cases than was given. The benefits to be considered and allowed by the jury, where only a part of an entire tract is taken, are not such as are common to lands generally in the vicinity, but such as result directly and peculiarly to the particular tract in question; as, for instance, where property is made more available and valuable by opening a street through it, or when land is drained or otherwise directly improved: so, in this case, if any part of the meadow not taken, bordering on the overflowed land, is benefited, or if the property is directly made more available for practical and advantageous use and enjoyment by the improvement. *Mills Em. Dom.* (2d ed.) 152 *et seq.* But remote or speculative benefits, in anticipation of a rise in property for town-site purposes, or, generally, by reason of the proposed improvement of a water-power and the erection of mills in the vicinity, cannot be considered.

It was also claimed by plaintiff on the trial that, as respects him, the condemnation proceedings were *coram non judice*. The petition, it seems, was presented to the court in due form, and subsequently duly filed in the county of Crow Wing, where the land is located. Upon such presentation the commissioners were appointed by the court, upon notice served by leaving, the same at the residence of the plaintiff, but the hearing therefor was had before the court, in pursuance of the terms of the notice, in the county of Marshall in the same district. The plaintiff, however, appeared before the commissioners, and was heard in respect to

**Damages—
Benefits.**

**Jurisdiction—
Waiver of ob-
jections.**

the amount of his damages, and, being dissatisfied with the award filed by them, appealed therefrom in pursuance of Stat. 1878, c. 34, § 23. The appeal (section 25) brought before the appellate court the propriety of the amount awarded for damages, as respects the parties thereto. The presenting and filing of the petition gave the court jurisdiction of the subject-matter, and the irregularity in the place named for the presentation of the petition might be waived; and, even if it went to the jurisdiction of the court over the plaintiff, the objection, we think, was waived by appearing and taking part in the proceedings before the commissioners, and appealing from the award. He thereby acknowledged and submitted to the jurisdiction of the court. *Rheiner v. Railroad Co.*, 31 Minn. 293; 14 Am. & Eng. R. R. Cas. 373; *Railroad Co. v. Patch*, 28 Kan. 470.

Order affirmed.

Eminent Domain—Excessive Damages.—It is said by the supreme court of Illinois, in the case of *Atchison, T. & S. F. R. Co. v. Schneider*, 20 N. E. Rep. 41, that, in condemnation proceedings where the jury awards the leases of the property, a sum largely in excess of that warranted by their own testimony as to the rental value and cost of removal, the verdict will not be set aside, notwithstanding the fact that the jury viewed the premises. See also *Clarke v. Chicago, etc., R. Co.*, 33 Am. & Eng. R. R. Cas. 156, note 158; *New Orleans, etc., R. Co. v. Frank*, 30 Ib. 275, note 276.

Same—Benefits.—In estimating the compensation to be made where part of a tract of land is taken by condemnation under the power of eminent domain, the benefits which are peculiar to the residue of the tract may be considered in reduction of the damages for the taking. *San Francisco, A. & S. R. Co. v. Caldwell*, 31 Cal. 367; *Nichols v. City of Bridgeport*, 23 Conn. 189; s. c., 60 Am. Dec. 636; *Nicholson v. New York & N. H. R. Co.*, 22 Conn. 74; s. c., 56 Am. Dec. 390; *Atlanta v. Central R. & B. Co.*, 53 Ga. 120; *Selma, R. & D. R. Co. v. Redwine*, 51 Ga. 470; *Jones v. Wills Valley R. Co.*, 30 Ga. 43; *St. Louis, J. & S. R. Co. v. Kirby*, 104 Ill. 345; s. c., 10 Am. & Eng. R. R. Cas. 214; *Pittsburgh, Ft. W. & C. R. Co. v. Reich*, 101 Ill. 157; *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 290; *Todd v. Kankakee & I. R. Co.*, 78 Ill. 530; *Wilson v. Rockford, R. I. & St. L. R. Co.*, 59 Ill. 273; *St. Louis, V. & T. H. R. Co. v. Brown*, 58 Ill. 61; *Hayes v. Ottawa, O. & F. R. V. R. Co.*, 54 Ill. 373; *Alton & S. R. Co. v. Carpenter*, 14 Ill. 190; *State v. Evans*, 3 Ill. (2 Scam.) 208; *Britton v. Des Moines, O. & S. R. Co.*, 59 Iowa, 540; s. c., 10 Am. & Eng. R. R. Cas. 412; *Tobie v. Brown Co.*, 20 Kan. 14; *Commissioners of Pottawatomie Co. v. O'Sullivan*, 17 Kan. 58; *Elizabethtown & P. R. Co. v. Helm*, 8 Bush (Ky.), 681; *Henderson & N. R. Co. v. Dickerson*, 17 B. Mon. (Ky.) 173; *New Orleans P. R. Co. v. Gay*, 31 La. An. 430; *Vicksburg, S. & T. R. Co. v. Calderwood*, 15 La. An. 481; *New Orleans, O. & G. W. R. Co. v. Lagarde*, 10 La. An. 150; *St. Louis & St. J. R. Co. v. Richardson*, 45 Mo. 466; *Sexton v. North Bridgewater*, 116 Mass. 200; *Dickenson v. Inhabitants of Fitchburg*, 79 Mass. (13 Gray) 546; *Farwell v. Cambridge*, 77 Mass. (11 Gray) 413; *Upton v. South Reading B. R. Co.*, 62 Mass. (8 Cush.) 600; *Meacham v. Fitchburg R.*, 58 Mass. (4 Cush.) 291; *Palmer v. Ferrill*, 34 Mass. (17 Pick.) 58; *Morin v. St. P. M. & R. R. Co.*, 30 Minn. 100; s. c., 10 Am. & Eng. R. R. Cas. 223; *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515; *Penrice v. Wallis*, 37 Miss. 172; *Wyandotte, K. C. & N. W. R. v. Waldo*, 70 Mo. 629; *Missis-*

Mississippi R. B. Co. *v.* Ring, 58 Mo. 491; Quincy, M. & P. R. Co. *v.* Ridge, 57 Mo. 599; Mayor, etc., of Lexington *v.* Long, 31 Mo. 369; Pacific R. *v.* Chrystal, 25 Mo. 544; Newby *v.* Platte Co., 25 Mo. 258; Carpenter *v.* Landaff, 42 N. H. 218; Mount Washington Co.'s Petition, 35 N. H. 134; Loweree *v.* Newark, 38 N. J. L. (9 Vr.) 155; State *v.* Blauvelt, 34 N. J. L. (5 Vr.) 361; Genet *v.* City of Brooklyn, 99 N. Y. 296; Raleigh & A. A. L. R. Co. *v.* Wicker, 74 N. C. 220; Columbus, P. & I. R. Co. *v.* Simpson, 5 Ohio St. 251; Putnam *v.* Douglas Co., 6 Oreg. 328; s. c., 25 Am. Rep. 527; Oregon C. R. Co. *v.* Wait, 3 Oreg. 91; Pittsburgh, L. E. & W. R. Co. *v.* Robinson, 95 Pa. St. 426; s. c., 1 Am. & Eng. R. R. Cas. 468; Philadelphia & E. R. Co. *v.* Cake, 95 Pa. St. 139; Root's Case, 77 Pa. St. 276; East Pennsylvania R. Co. *v.* Hottenstine, 47 Pa. St. 28; *Patzen v.* Northern C. R. Co., 33 Pa. St. 426; s. c., 75 Am. Dec. 612; Pennsylvania R. Co. *v.* Lippincott (Pa.), 8 Cent. Rep. 826; Greenville & C. R. Co. *v.* Partlow, 5 Rich. (S. C.) L. 428; Woodfolk *v.* Nashville & C. R. Co., 2 Swan (Tenn.), 422; Gulf, Colorado & S. F. R. Co. *v.* Fuller, 63 Tex. 467; Bufalo, Bayou B. & C. R. Co. *v.* Ferris, 26 Tex. 588; Chicago & M. C. R. Co. *v.* Ritter (Tex.), 10 Am. & Eng. R. R. Cas. 202; Mitchell *v.* Thornton, 21 Gratt. (Va.) 178; James River & K. Co. *v.* Turner, 9 Leigh (Va.), 313; Railroad Co. *v.* Tyree, 7 W. Va. 699; Holton *v.* Milwaukee, 31 Wis. 27; Robbins *v.* Milwaukee & H. R. Co., 6 Wis. 636.

The benefits derived must be allowed for, even though such benefits should amount to a sum sufficient to cancel the whole. Trinity College *v.* Hartford, 32 Conn. 452; Nichols *v.* Bridgeport, 23 Conn. 189; Guess *v.* Stone Mountain Granite R. Co., 72 Ga. 320; Atlanta *v.* Green, 67 Ga. 386; Elgin *v.* Eaton, 83 Ill. 535; Page *v.* Chicago, M. & St. P. R., 70 Ill. 324; Indiana C. R. Co. *v.* Hunter, 8 Ind. 74; Whitman *v.* Boston & M. R. Co., 85 Mass. (3 Allen) 133; Com. *v.* Middlesex, 9 Mass. 388; Winona & St. P. R. Co. *v.* Waldron, 11 Minn. 515; Jackson *v.* Waldo, 85 Mo. 637; Livingston *v.* Mayor, etc., of N. Y., 8 Wend. (N. Y.) 85; s. c., 22 Am. Dec. 622; Platt *v.* Pennsylvania Co., 43 Ohio St. 228; s. c., 22 Am. & Eng. R. R. Cas. 130; Putnam *v.* Douglas Co., 6 Oreg. 328; Livermore *v.* Jamaica, 23 Vt. 361.

General Benefits.—The benefits which will be off-set against the damages for a taking must be those which are special to the land, and not simply such as are common to the general public. Nichols *v.* Bridgeport, 23 Conn. 189; St. Louis, J. & S. R. Co. *v.* Kirby, 104 Ill. 345; s. c., 10 Am. & Eng. R. R. Cas. 214; Chicago, M. & St. P. R. Co. *v.* Hall, 90 Ill. 42; Keithsburg & E. R. Co. *v.* Henry, 79 Ill. 290; Page *v.* Chicago, M. & St. P. R. Co., 70 Ill. 324; Mix *v.* Lafayette, B. & M. R. Co., 67 Ill. 319; Elizabethtown & P. R. Co. *v.* Helm's Heirs, 8 Bush (Ky.), 681; Vicksburg, S. & T. R. Co. *v.* Calderwood, 15 La. An. 481; Bangor & P. R. Co. *v.* McComb, 60 Me. 290; Green *v.* Fall River, 113 Mass. 262; Allen *v.* Charlestown, 109 Mass. 243; Whitman *v.* Boston & M. R. Co., 85 Mass. (3 Allen) 133; s. c., 89 Mass. (7 Allen) 313; Old Colony & F. R. Co. *v.* Plymouth Co., 80 Mass. (14 Gray) 155; Dickinson *v.* Fitchburg, 79 Mass. (13 Gray) 546; Davis *v.* Charles River Br. R. Co., 65 Mass. (11 Cush.) 506; Meacham *v.* Fitchburg R. Co., 58 Mass. (4 Cush.) 291; Com. *v.* Combs, 2 Mass. 489; Carli Stillwater & St. P. R. Co. *v.* McNamara, 13 Minn. 508; Winona & St. P. R. Co. *v.* Waldron, 11 Minn. 515; Combs *v.* Smith, 78 Mo. 32; Wyandotte, K. C. & N. W. R. Co. *v.* Waldo, 70 Mo. 629; Tebo & N. R. Co. *v.* Kingsbery, 61 Mo. 51; Hoshier *v.* Kansas City, St. J. & C. B. R. Co., 60 Mo. 303; s. c., 9 Am. Ry. Rep. 230; Mississippi R. B. Co. *v.* Ring, 58 Mo. 491; Quincy, M. & P. R. Co., 53 Mo. 178; St. Louis & St. J. R. Co. *v.* Richardson, 45 Mo. 466, 483; Pacific R. Co. *v.* Chrystal, 25 Mo. 544; Alden *v.* White Mountains N. H. R. Co., 55 N. H. 413; s. c., 11 Am. Ry. Rep. 246; Carpenter *v.* Landaff, 42 N. H. 218;

Betts v. Williamsburg, 15 Barb. (N. Y.) 255; *Livingston v. Mayor, etc., of N. Y.*, 8 Wend. (N. Y.) 85; s. c., 22 Am. Dec. 622; *Raleigh & A. A. L. R. Co. v. Wicker*, 74 N. C. 220; *Commissioners of Ashville v. Johnston*, 71 N. C. 398; *Freedle v. North Carolina R. Co.*, 4 Jones (N. C.) L. 89; *Miami R. Co. v. Collett*, 6 Ohio St. 182; *Pittsburgh, L. E. & W. R. Co. v. Robinson*, 96 Pa. St. 426; s. c., 1 Am. & Eng. R. Cas. 468; *Root's Case*, 77 Pa. St. 276; *Hornstein v. Atlantic & Gt. W. R. Co.*, 51 Pa. St. 87; *Grafton & G. R. R. Co. v. Foreman*, 24 W. Va. 662; s. c., 20 Am. & Eng. R. R. Cas. 215; *Chapman v. Oshkosh & M. R. R. Co.*, 33 Wis. 629; *Robbins v. Milwaukee & H. R. Co.*, 6 Wis. 636.

The benefits must be to the tract of land a portion of which is taken, or they cannot be considered. *Todd v. Kankakee & I. R. Co.*, 78 Ill. 530; *St. Louis, V. & T. H. R. Co. v. Brown*, 58 Ill. 61; *White Water Valley R. Co. v. McClure*, 29 Ind. 536; *Newcastle & R. R. Co. v. Brumback*, 5 Ind. 543; *Koestenbader v. Peirce*, 41 Iowa, 204; *Hunt v. Smith*, 9 Kan. 137; *St. Joseph & D. C. R. Co. v. Orr*, 8 Kan. 419; *Louisville & N. R. Co. v. Glazebrook*, 1 Bush (Ky.), 325; *Isom v. Mississippi C. R. Co.*, 36 Miss. 300; *Giesy v. Cincinnati, W. & Z. R. Co.*, 4 Ohio St. 308; *Buffalo, B. & C. R. Co. v. Ferris*, 26 Tex. 588.

Offset Against Damages to Land Not Taken.—In some cases it has been held that special benefits may be considered in reduction of damages for injury to the residue of the tract taken, but that they cannot be set off against the value of the part taken. *Atlanta v. Central R. & B. Co.*, 53 Ga. 120; *Augusta v. Marks*, 50 Ga. 612; *Mayor of Savannah v. Hartridge*, 37 Ga. 113; *Jones v. Wills V. R. Co.*, 30 Ga. 43; *Young v. Harrison*, 17 Ga. 30; *McReynolds v. Baltimore & O. R. Co.*, 106 Ill. 152; *Pittsburgh, Ft. W. & C. R. Co. v. Reich*, 101 Ill. 157; *Hyslop v. Finch*, 99 Ill. 171; *Todd v. Kankakee & I. R. R. Co.*, 78 Ill. 530; *Page v. Chicago, M. & St. P. R. Co.*, 70 Ill. 324; *Hayes v. Ottawa, O. & F. R. V. R.*, 54 Ill. 373; *Swinney v. Ft. Wayne, M. & C. R. Co.*, 59 Ind. 205; *Newcastle & R. R. v. Brumback*, 5 Ind. 543; *Britton v. Des Moines R.*, 59 Iowa, 540; *Elizabethtown R. v. Helm's Heirs*, 8 Bush (Ky.), 681; *Louisville R. v. Glazebrook*, 1 Bush (Ky.), 325; *Sutton's Heirs v. Louisville*, 5 Dana (Ky.), 28; *Robinson v. Robinson*, 1 Duv. (Ky.) 162; *Henderson & N. R. Co. v. Dickerson*, 17 B. Mon. (Ky.) 173; *New Orleans & P. R. Co. v. Gay*, 31 La. An. 430; *Vicksburg, S. & T. R. Co. v. Calderwood*, 15 La. An. 481; *New Orleans, O. & G. W. R. v. Lagarde*, 10 La. An. 150; *Shipley v. Baltimore & P. R. Co.*, 34 Md. 336; *State v. Leslie*, 30 Minn. 533; *Isom v. Mississippi R. R.*, 36 Miss. 300; *Fremont, E. & M. V. R. Co. v. Ward*, 11 Neb. 597; *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb. 585; s. c., 5 Am. & Eng. R. R. Cas. 364; *Wagner v. Gage Co.*, 3 Neb. 237; *State v. Miller*, 23 N. J. L. (3 Zab.) 383; *Raleigh & A. A. L. R. v. Wicker*, 74 N. C. 220; *Cleveland & P. R. Co. v. Ball*, 5 Ohio St. 568; *Memphis v. Bolton*, 9 Heisk. (Tenn.) 508; *Woodfolk v. Nashville & C. R.*, 2 Swan (Tenn.), 422; *Buffalo, B. & C. R. v. Ferris*, 26 Tex. 588; *Mitchell v. Thornton*, 21 Gratt. (Va.) 178; *James River & K. Co. v. Turner*, 9 Leigh (Va.), 313; *Railroad Co. v. Tyree*, 7 W. Va. 693; *Chapman v. Oshkosh R.*, 33 Wis. 629.

Same—Where Offset of Benefits Prohibited.—In some states, however, an allowance on account of benefits is prohibited altogether either by statute or by constitutional provision. *Alabama & F. R. Co. v. Burkett*, 42 Ala. 83; *St. Louis, A. & T. R. Co. v. Anderson*, 39 Ark. 167; s. c., 17 Am. & Eng. R. R. Cas. 97; *Atlanta v. Central R. & B. R. Co.*, 53 Ga. 120; *St. Louis, J. & S. R. R. Co. v. Kirby*, 104 Ill. 345; s. c., 10 Am. & Eng. R. R. Cas. 214; *Todd v. Kankakee & I. R. R. Co.*, 78 Ill. 530; *Carpenter v. Jennings*, 77 Ill. 250; *Wilson v. Rockford, R. I. & St. L. R. Co.*, 59 Ill. 273; *St. Louis, V. & T. H. R. v. Brown*, 58 Ill. 61; *Evansville, I. & C. S. L. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Briton v. Des Moines, O. & S.*

R. Co., 59 Iowa, 540; s. c., 10 Am. & Eng. R. R. Cas. 412; Koestebader v. Peirce, 41 Iowa, 204; Bland v. Hixenbaugh, 39 Iowa, 532; Esreal v. Jewett, 29 Iowa, 475; Deaton v. County of Polk, 9 Iowa, 596; Henry v. Dubuque & P. R. Co., 2 Iowa, 288; Jacob v. Louisville, 9 Dana (Ky.), 114; Rice v. Danville, L. & N. Turnpike Co., 7 Dana (Ky.), 81; Sutton's Heirs v. Louisville, 5 Dana (Ky.), 28; Helderson & N. R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173; s. c., 66 Am. Dec. 149; Macon v. Patty, 57 Miss. 397; New Orleans, J. & G. N. R. Co. v. Moye, 39 Miss. 385; Penrice v. Wallis, 37 Miss. 172; Isom v. Mississippi C. R. Co., 36 Miss. 300; Brown v. Beatty, 34 Miss. 227; s. c., 69 Am. Dec. 389; Fremont, E. & M. V. R. Co. v. Whalen, 11 Neb. 585; s. c., 5 Am. & Eng. R. R. Cas. 364; Swayze v. New Jersey M. R. Co., 36 N. J. L. (7 Vr.) 295; s. c., 12 Am. Ry. Rep. 404; Carson v. Coleman, 11 N. J. Eq. (3 Stockt.) 106; Albany M. R. Co. v. Lansing, 15 Barb. (N. Y.) 68; Giesy v. Cincinnati, W. & Z. R., 4 Ohio St. 308; Padauch & M. R. Co. v. Stovall, 12 Heisk. (Tenn.) 1; Memphis v. Bolton, 9 Heisk. (Tenn.) 508; Woodfolk v. Nashville & C. R., 2 Swan (Tenn.), 422; Milwaukee & M. R. Co. v. Strange, 63 Wis. 178; s. c., 20 Am. & Eng. R. R. Cas. 413; Robbins v. Milwaukee & H. R., 6 Wis. 636.

In the case of Laffin v. Chicago, W. & N. R. Co., 33 Fed. Rep. 418, it was held that, in an action for damages to lands in Wisconsin, resulting from the construction of a railroad, the fact that the road is a trunk line to Chicago is not such a benefit to plaintiff as will be considered in abatement of the damages suffered by him.

In *James v. Ontario & Quebec R. Co.*, 15 Ont. Rep. 1, the court held, affirming the judgment of *Ferguson, J.*, 12 Ont. Rep. 624, that, in ascertaining the compensation to be made to a land-owner for land expropriated for a railway under R. S. C. ch. 109 §. 8, the value of the part taken (as well as the increased value of the part not taken, which by subsec. 21 is to be set off) must be ascertained with reference to the date of the deposit of the map or plan and book of reference, under subsec. 14 (or in this case with reference to the date of the notice or determination to expropriate); and therefore such value should include an increase which may have been caused by or is owing to the contemplated construction of the railway.

Semble, per Burton, J.A., that what is intended by subsec. 21 is a direct or peculiar benefit accruing to the particular land in question, and not the general benefit to all land-owners resulting from the construction of the railway.

Semble, per Osler, J. A.—The land in question not having been taken for the purpose of the railway strictly, but, after the same had been laid down, for the purpose of effecting a deviation in a street in order that the railway might run along the original street, there was no right to set off the increased value of the land not taken, caused by the construction of the railway.

FITZ

v.

NANTASKET BEACH R. CO.

(*Massachusetts Supreme Judicial Court, November 28, 1888.*)

Eminent Domain—Compensation—Use of Way—Instruction.—In a proceeding to assess damages for taking petitioner's land, where the right of way appurtenant thereto was cut off, and the uncontradicted evidence discloses the fact that the same was "an ancient cartway, through gates and bars," and "an inherent right in the land," a request to charge that, if the way "had been through gates and bars for the passage of cattle through and from the pasture, and for such incidental uses only as would belong to a way leading to and from the pasture, then, if the character of the land changes from pasture to building-lots, the right to use that way as an open way, by occupants of cottages erected on the land, would not be included in the rights of way as now existing," is properly refused.

Same—Right to Use Way—Instruction.—In such a case, an instruction that the continued existence of the way "does not depend upon the land remaining pasture-land" is correct.

EXCEPTIONS from Superior Court, Plymouth County. The land in question was cut in two parts by the railroad, and the company did not reserve or secure to petitioner any right of crossing the railroad from one part to the other. The only access to the land was from the lands of another by the cartway.

Further facts sufficiently appear in the opinion.

B. W. Harris and *J. O. Burdett* for respondent.

Asa French and *E. C. Bumpus* for petitioner.

W. ALLEN, J.—The first question relates to the effect upon the value of the plaintiff's land of the right of way appurtenant to it. It is admitted by the respondent that the right would remain appurtenant to any lots into which the land might be divided. The instruction that "The way must still be used under the same restrictions that now appertain to it; that the way must be used conformably to the character which it now bears; and I so instruct the jury, and leave them to say, upon their view of the way, and upon the evidence in the case, what the use is, and what the restrictions are," cannot be objected to. The objection is to the refusal of the judge to give the instruction prayed for, that, if the way "had been through gates and bars for the passage of cattle to and from the pasture, and for

Effect of right
of way on
value of land
—Instruction.

such incidental uses only as would belong to a way leading to and from a pasture, then, if the character of the Fitz land changes from a pasture to building-lots, the right to use that way as an open way by occupants of cottages erected on the land would not be included in the rights of way as now existing;" and to the instructions given, that the continued existence of the way "does not depend upon the land remaining pasture-land,"—"that it would be as available, if a man had a cottage-house there for him to use it as a cartway, and for the purposes for which it is now used, as if he still had a pasture there;" and, with reference to any number of cottages which might be built upon the land, "that each one of them would have the right to use the way as an ancient passageway and as a cartway, just as the evidence characterized it and indicated it to be." The evidence was that the land was separated from the highway by land of one Stearns, over which was a right of way by prescription appurtenant to petitioner's land, which the exceptions state was a "cartway through gates and bars." Said Stearns was a witness, and testified that the way, which was through a gate at the highway, was "an ancient cartway—a right to cross the land." The husband of the petitioner was a witness, and testified that it was "an ancient right of passage-way over the Stearns land by prescription; that his wife had a right to it; that it was an inherent right in the land." There was no evidence to contradict this evidence as to the way. It appeared that the land was known as the "Loud Pasture," that there was no building upon it, and that the only income which had been derived from it was rent paid from time to time by persons who had hired it for pasturage purposes. A view of the premises was had by the jury. However correct the instruction asked for by the respondent may be as matter of law, it was not applicable to the evidence. It does not appear that there was any evidence of the particular use that had been made of the way, or that the use had been restricted to driving cattle to and from pasture. On the contrary, it is expressly stated that there was nothing to contradict the testimony that it was a cartway and a right of passage over the land. The court did not designate the particular uses which had been and might be made of the way, or prescribe the restrictions upon the use. It carefully left this to the jury, and only, in effect, ruled that the way which the uncontradicted evidence showed to be appurtenant to the land would remain appurtenant to the parcels into which it might be divided. We think that this ruling, and the instructions given in accordance with it, were correct. The objections to the instructions that the jury, in estimating damages, should not consider the probability or possibility that a

highway would be laid out over the railroad, were not insisted on. Exceptions overruled.

Eminent Domain—Compensation—Right of Way.—It is said, in the case of *Lafin v. Chicago, W. & N. R. Co.*, 33 Fed. Rep. 415, that, in an action for damages by the construction of a railroad across a tract of land, the plaintiff cannot recover for injury to drives about the premises, the annoyance, or danger of fire from passing trains, loss of patronage to a hotel on such lands, cost of retaining wall along the track, or for improper or negligent construction of the road.

In *Shealy v. Chicago & M. N. R. Co. (Wis.)*, 40 N. W. Rep. 145, it is said that a railroad company, lowering the grade of a street to adjust it to its tracks, is liable to the owner of an adjacent lot injured thereby as for land taken for the company's use, though none of the lot itself is actually taken.

DOWD

v.

MASON CITY & FORT DODGE R. CO.

(*Iowa Supreme Court, December 22, 1888.*)

Eminent Domain—Damages—Measure of.—In proceedings to determine the damage for lands appropriated to railroad purposes, the recovery is not limited to the damages which the owner would sustain if the property were to be used only for the purposes to which it is devoted; but the value of the property for any purpose for which it is available may be considered. (Following *In re Furman Street*, 17 Wend. (N.Y.) 669; *Boom Co. v. Patterson*, 98 U. S. (8 Otto) 403; bk. 25, L. ed. 206.)

Same—Damages to Adjacent Lands.—Damages resulting to adjoining lands by reason of improper construction of a railroad cannot be had in proceedings to recover for the land appropriated in the construction and operation of the road.

Same—Removal of Dirt—Damages.—If the railway company, in constructing its road, goes upon land outside its right of way and removes earth therefrom belonging to another, it is a trespasser and is liable as such.

Same—Rule of Damages—Market Value of Land.—The rule for estimating the damages to lands appropriated for railroad purposes is to ascertain the fair merchantable value of the premises over which the road passes, and the like value of the same premises in their condition after the right of way is taken, leaving out of view all the time any benefits resulting from the improvement. (Following *Fleming v. Railway Co.*, 34 Iowa, 357.)

Same—Entire Tract—Assessment of Damages.—Where the land has been treated as an entirety, though different portions of it might be devoted with greatest advantage to different purposes, the plaintiff is entitled to have the entire tract considered in the assessment of damages.

APPEAL from District Court of Webster County.

The facts are sufficiently set forth in the opinion.

A. N. Botsford for appellant.

Thco. Hawley for appellee.

ROBINSON, J.—Plaintiff is the owner of a tract of land containing about 41 acres, which is situated near the town of Lehigh. Defendant has located and constructed a railway across a portion of this tract, and, for that purpose, appropriated nearly five acres for its right of way. The question involved in the case is the amount of damages to which plaintiff is entitled by reason of such appropriation.

1. Plaintiff was permitted to introduce evidence which tended to show that the land in question contains beds of coal. This was objected to by defendant, and its admission is assigned as error. It is insisted by appellant that it acquired but an easement in the land, without any right to coal which might lie below its surface; that plaintiff's right to mine and remove the coal was not in any manner affected by the easement, and therefore that the evidence in question introduced an element of value which should not have been considered by the jury. We do not think this position is well taken. The evidence was introduced to show the true character of the land, and had direct relation to its value as an entirety. No attempt was made to show the separate value of the coal which underlaid the right of way. The jury were instructed that the mineral beneath the surface belonged to the owner of the land, and that it could be considered by them only so far as it affected the market value of the land. We understand the well-established rule in proceedings of this character to be that the recovery of the property-owner is not limited to the damages which he would sustain if the property were to be used only for the purposes to which it is devoted, when such proceedings are had; but that the value of the property for any purpose for which it is available may be considered. *Boom Co. v. Patterson*, 98 U. S. 403; *In re Furman St.*, 17 Wend. 669; *Goodin v. Canal Co.*, 18 Ohio St. 169; *Young v. Harrison*, 17 Ga. 30; *Stinson v. R. Co.*, 6 N. W. Rep. 786; *R. Co. v. Warren*, 12 Pac. Rep. 642; *Railway Co. v. Woodruff*, 49 Ark. 381; s. c., 33 Am. & Eng. R. R. Cas. 169; *State v. Moore*, 12 Cal. 71. If the property in question had value as coal land, it was proper to show that fact. But it is said that there was no evidence that the coal would be affected by the building of the road. If that be true, then, under the charge of the court, no prejudice could have resulted to defendant from the evidence in controversy.

2. The right of way appropriated by defendant was 100 feet in width. Plaintiff was permitted to show that his land outside the right of way was entered upon by defendant, and soil removed in connection with the construction of the railway. In one place the soil was removed outside the right of way to a depth of four

Measure of
damages—
Value of prop-
erty as coal
land.

Damages to
adjacent lands
—Removal of
dirt.

feet, and for a width, including the right of way, of 221 feet. In ruling upon this evidence, the court remarked that it "must be taken into consideration in estimating the difference in value before and after the building of the road." We think this was erroneous. The proceedings were brought to ascertain the damage caused to plaintiff by the taking of a right of way 100 feet wide for railway purposes. The damages which can be considered in such a proceeding are those which will result from a proper use of the land appropriated in the construction and operation of the railway. *Miller v. R. Co.*, 63 Iowa, 685; 14 Am. & Eng. R. R. Cas. 293. Damages which result from an improper construction of the road cannot be considered in such proceeding. *King v. Railroad Co.*, 34 Iowa, 458. If a railway company, in constructing its road, goes upon land outside its right of way, and removes therefrom earth or other property belonging to an owner, it is a mere trespasser, and is liable as such. See *Waltemeyer v. Railway Co.*, 71 Iowa, 628.

It is claimed that the error in question was cured by the instructions, but we do not find this to be the case. It is true, the jury were told that it was the intention of the law to give the land-owner the value of the land actually taken, and in addition thereto the depreciation in value of his adjoining land by reason of the right of way, irrespective of benefits. Also that the railroad company acquired by proceedings of this nature the right to a strip of land 100 feet in width, to locate, build, and operate therein its road, and that "Such right extends no further than the right of location, construction, and convenient use of its railway, and to take and remove and use any earth, stone, timber, etc., on or from the land so taken, which may be necessary for the purpose." But the evident intent of the paragraph in which the portion of the charge just quoted appears was to explain the nature of the right acquired by the defendant; and the fact that it was a surface right only, and that it did not extend to mineral deposits below the surface, was made especially prominent. The jury were also charged that it was their sole duty "to ascertain and assess the damages sustained by the plaintiff by reason of the location and construction of" the railway of defendant across the land in controversy. Also that, in determining these damages, they should first ascertain the fair market value of the premises before the location and construction of the road, and the like value after its location and construction, disregarding benefits. The evidence as to the amount of damages fixed it as the difference between the value of the land before the building of the road, and after it was built. That difference necessarily included the damage caused by the removal of the soil from that portion of the land outside the right of way. The jury were not, in

Rule of damages—Market value.

terms, told to disregard the damage last named, while some portions of the charge required them to allow for it. The theory of the court below seemed to be that plaintiff was entitled to recover in this proceeding all damages which resulted from the building of the road, whether the operations of defendant were confined to the right of way or not. As already stated, we do not understand this to be the rule. It is usual for railway companies to secure their right of way in advance of the building of their road, and the law contemplates that this shall be done. The law fixes the amount of land which may be appropriated without the consent of the owner, and the railway company cannot rightfully use more. There would be no authority for assessing damages for an anticipated trespass before the construction of the road, and the damages contemplated by the law are the same whether before or after the road is built, excepting that in the latter case interest may be allowed. *Daniels v. Railroad Co.*, 41 Iowa, 52. The rule for estimating the damages adopted by this court is "to ascertain the fair merchantable value of the premises over which the road passes, and the like value of the same premises in their condition after the right of way is taken, leaving out of view all the time any benefits resulting from the improvement." *Fleming v. Railroad Co.*, 34 Iowa, 357. Or, as stated in *Henry v. Railroad Co.*, 2 Iowa, 309, it is "to determine the fair marketable value of the premises, before the right is set apart, and then again after, and the difference will be the true measure of damages," to which must be added the modification that benefits must be disregarded, required by the constitution of 1857. The safer and better rule is to confine the damages recoverable in proceedings of this kind to those which naturally result from the taking and rightful use of the right of way and the proper construction of the road, and to permit the land-owner to recover other damages to which he is entitled in an action brought therefor. It is in harmony with the law, as heretofore construed by this court, and will secure greater simplicity and certainty in proceedings of this character.

3. It appears that a portion of the tract in question is bottom-

Land to be
treated as an
entire tract.

land, near the river, and that a portion is high upland. The court refused to give an instruction asked by defendant, as follows: "You are instructed that, if one portion of this land in question was adapted to one use, and another portion of the same to a different use, and only one of such portions is covered by the right of way of defendant, the portion not so crossed cannot be taken into consideration in determining the damages done to the land." We think this instruction was rightly refused. It does not appear that any division of the land has been contemplated by plaintiff, nor that such a division is necessary. The land has been treated as an

entirety, and, while different portions might be devoted with greater advantage to different purposes, yet that has not been done, and plaintiff was entitled to have the entire tract considered in the assessment of damages. The facts in this case are materially different from those involved in the case of *Haines v. Railway Co.*, 65 Iowa, 216; 20 Am. & Eng. R. R. Cas. 260. For the error specified, the judgment of the district court is reversed.

Eminent Domain—Measure of Damages.—Respecting the measure of damages in the case of appropriation of private property to public use, see *ante*, *Wabash, St. L. & P. R. Co. v. McDougall*, and note.

Same—Ascertaining Damages—Injury to Adjoining Lands.—It is said by the supreme court of Kentucky, in the case of *Asher v. Louisville & N. R. Co.*, 8 S. W. Rep. 854, that Act Ky., April 11, 1882, providing that, in the condemnation of land by a railroad company, the value of the land and the material taken must be awarded separately from any damages that may result to the adjacent lands of the owner, does not require that the value of land taken from a small tract upon which the dwelling, barns, orchard, etc., of the owner stand be awarded separately from the damages to the adjacent land in the same tract, resulting from the injury to the dwelling, barns, etc.

In an action for damages to land caused by the construction of a railroad, the plaintiff is entitled to recover the then fair market value of the part taken, and the amount of the damage to the residue by such taking, to be estimated by considering the value of the land for the purposes for which it was used when taken, or its reasonable adaptability to particular uses, having reference to the existing wants or business of the community, or such as might then have been reasonably expected in the near future, *Lafin v. Chicago, W. & N. R. Co.*, 33 Fed. Rep. 415.

In the case of *Shealy v. Chicago, M. & N. R. Co.*, 40 N. W. Rep. 158, the court of Wisconsin say: "A railroad company lowering the grade of a street to adjust it to its tracks is liable, to the owner of an adjacent lot injured thereby, as for land taken for the company's use, though none of the lot itself was actually taken."

Same—Market Value of Land.—See *ante*, *Wabash, St. L. & P. R. Co. v. McDougall*, and note.

Same—Elements of Damage.—Respecting the elements of damage in the case of appropriation under the power of eminent domain, see *Bell v. Chicago B. & O. R. Co.* (Iowa), 37 N. W. Rep. 768; *Wichita & W. R. Co. v. Kuhn*, 38 Kan. 104; *Missouri Pac. R. Co. v. Delany*, 38 Kan. 246; *Kansas City & E. R. Co. v. Kregelo*, 32 Kan. 608; *Blakeley v. Railroad Co.* (Neb.), 40 N. W. Rep. 956; *In re Rugheimer*, 36 Fed. Rep. 376.

It is said in *Blakeley v. Chicago, K. & N. R. Co.*, 40 N. W. Rep. 956, that, it is competent for witnesses in estimating the damages to the value of the real estate after the location of the road, to take into consideration all elements caused by the construction of the road which would tend to diminish the value of the property.

What is to be Regarded as Single Tract of Land, in Assessment of Damages.—See *Potts v. Pennsylvania, S. V. R. Co.*, 33 Am. & Eng. R. R. Cas. 184, note, 193.

CENTRALIA AND C. R. CO.

*v.*BRAKE *et al.**(Illinois Supreme Court, June 16, 1888.)*

Eminent Domain—Element of Damages—Consequential Damages—Failure to Fence Road.—In a trial by jury in proceedings for condemnation of right of way over lands, an instruction that "By law, railroad corporations are not required to fence their roads for six months after the roads are opened for use, and the damages attending the keeping open of the farm for that length of time may properly be considered as an element of damages" is not erroneous in the absence of a stipulation on the part of the company to erect its fences so as to prevent injury to the land-owner.

Same—Danger from Fire.—Where it appears in evidence that the witnesses, in making estimate of injury, included the damages which might arise from fire by reason of the operation of the railroad through the farms, a request to instruct the jury that "The increased hazard and danger to buildings from fire by reason of the operation of the road should not be considered as an element of damage" was properly refused.

APPEAL from Washington County Court. Proceeding by the plaintiff to condemn lands of defendant's for railroad purposes.

Facts sufficiently set forth in the opinion.

W. S. Forman and *Daniel Hay* for appellant.

W. H. Moore and *James A. Watts* for appellees.

SHOPE, J.—This was a petition in the usual form by appellant railroad company, for condemnation of right of way over lands of appellees. The trial by jury resulted in award-

Case stated. ing appellee Maria J. Brake \$400, and appellee Meinert \$575, as compensation for land taken, and damages to land not taken. The petitioner prosecutes this appeal. Errors are assigned upon the rulings of the court in giving the fourth instruction of appellees' series, and refusing the third, fifth, and sixth instructions offered by the railroad company, and in the admission of testimony. The fourth instruction asked and given at the instance of appellees is as follows: "The court instructs you that, by law, railroad corporations are not required to fence their roads for six months after said roads are open for use; and the damages attending the keeping of the farm for that length of time may properly be considered by you as an element of damages."

By the statutee, very railroad corporation is required, within six months after any part of its line of railway is open for use, to erect and thereafter maintain fences on both sides of its right of way so far as the railroad has been opened for use, except at certain designated places, suitable and sufficient to prevent stock from getting thereon. The failure, to perform the statutory duty to fence its roadway, after the expiration of six months renders the corporation liable *prima facie* for stock killed or injured by its agents, engines, or cars. *Railroad Co. v. Lynch*, 67 Ill. 149. The company may avail itself of the whole six months in which to perform the duty; and if, prior to the expiration of that time, stock gets upon the railroad, and is killed or injured, the owner cannot recover without proving negligence on the part of the company. *Railway Co. v. Barrie*, 55 Ill. 226. The company would be liable only for injuries to stock resulting from its failure to properly construct its road, or to manage and operate its locomotives and cars in a reasonable and prudent manner. If stock, from the pasture-land through which the road was operated, goes upon the railroad track, and are injured by the company's agents, engines, or cars while such engines and cars are being operated with ordinary and reasonable care, the land-owner is without remedy. If, therefore, the land-owner desires to use his pasture, he must fence the road or submit to the hazard of injury to his stock by the ordinary operation of the road. It can readily be seen that pasture-lands, or those susceptible of pasturage, would, as a matter of fact, be depreciated for that use by the exposure, of stock placed therein, to such injury. It will be clearly incompetent and improper for the jury to enter upon conjecture as to the probable injury to stock, or the damages that might result therefrom. But if, in consequence of the appropriation of the land by the company as right of way, the present market value of the land through which the road is located, either for sale upon the market, or the value of the use of the land for the purposes to which it is appropriated by the land-owner, or to which it is adapted, is depreciated, such depreciation in value or loss to the land-owner is an element of damage proper to be considered by the jury in determining the compensation to be paid for land damaged but not taken. *Railway Co. v. Teters*, 68 Ill. 144; *McReynolds v. Railway Co.*, 106 Ill. 152; 14 Am. & Eng. R. R. Cas. 172; *Railroad Co. v. McKinley*, 64 Ill. 238; *Railroad Co. v. Bowman*, 122 Ill. 595; *Railway Co. v. Moore*, 33 Am. & Eng. R. R. Cas. 179. This instruction, in all essential particulars, was before us in *Railroad Co. v. Kirby*, 104 Ill. 345; s. c., 10 Am. & Eng. R. R. Cas. 214; and it was there said: "The inconvenience of having a man's land temporarily thrown open in the progress and construction

Elements of
damage—Failure to fence.

of the road may be a material element, and justly require compensation."

It is said, however, that this instruction is erroneous because it assumes there would be "damage attending the keeping open of the farm," etc. The instruction is clearly faulty in the respect indicated. The question of whether there would be damages attending the keeping open of the farm, and whether it would be kept open, should have been submitted to the jury as questions of fact. But it cannot be seen that appellant was injured by this assumption of the court. The appellant alone could determine when, within six months, its road should be fenced; and if it desired to eliminate from the case this element of damage, no reason is perceived why it might not have done so by appropriate stipulation to erect its fences so as to prevent injury to the land-owner. But one recovery could be had by appellees for the land taken or damaged; and they must in this action recover, for all time, the injury to their land resulting from the appropriation by the railroad company of the right of way; and it is not unreasonable to require appellant, in the absence of any offer or stipulation showing a contrary intention, to pay all such damages as will result from its availing itself of the delay allowed it by law. The evidence introduced by appellant alone related to the value per acre of the land taken. The witnesses introduced by appellees vary somewhat in their estimate of the damages, ranging in respect to the land of appellee Meinnert from \$800 to \$1000, and as to the land of appellee Brake from \$500 to \$900. If we exclude the evidence derived by the jury from their personal inspection of the premises, it is apparent the verdict is, in each case, much below the estimate of damages of any of the witnesses. There is no conflict in the evidence in respect to the location of the road, or how it would divide the farms of appellees, or what effect it would have upon the uses to which the land was appropriated, and no different effect could have been produced upon the mind of a jury by the instruction under consideration than would have resulted if the instruction had been properly guarded by requiring them to find the fact. We have so repeatedly held that an error which has produced no injury will not be ground for reversal, that citation of authority is unnecessary.

The witnesses for appellee, upon cross-examination, among other reasons given for their estimate of damages, stated they included the damages from fire, etc., by reason of the operation of the railroad through these farms. Appellant objected to the evidence, which objection was overruled, and appellant excepted. No motion was made to exclude the evidence in chief of the witnesses; but instructions were asked, and refused by the court, to the effect that the in-

Same—Dam-
ages from fire.

creased danger and hazard to buildings, etc., from fire by reason of the operation of the road, should not be considered by the jury as an element of damage. There was no error in this ruling. If, by reason of the proximity of buildings, fences, and the like, to the track of the railroad, the market value of the farms as a whole was depreciated; or if, from the ordinary and usual manner of the operation of the road, the danger from fire had a tendency to lessen the value of the premises for sale, or for the use to which they were appropriated by the owner, or to which they were adapted,—that fact would become an important element in fixing the just compensation to be awarded the owner for the appropriation of his land to the uses of appellant company. Authorities *supra*. Finding no errors in this record, the judgment is affirmed.

Eminent Domain—Elements of Damage.—As to, see, *ante*, *Dowd v. Mason City & F. D. R. Co.*, 633, and note, 637.

Same—Failure to Fence.—Acts Va. 1883-84, c. 524. § 6, provides that, where railroads run through inclosed farms, and the company has paid to the owner of the land damages for making fences on each side, and for keeping them in repair, the provisions of the act imposing a penalty on the company for failure to build and keep such fences in repair shall not apply. It also provides that no report of commissioners appointed to assess damages shall be taken as proof of such payment unless it appear from the face of the report, or other sufficient evidence, that an estimate was made for the fencing, and that the cost of the same constituted a part of the sum reported and paid. *Held*, that the company have not the option of fencing the roadbed or suffering the penalty, but that an assessment of damages, in the report of commissioners, allowing for the cost of fencing, is proper and binding. *Norfolk & W. R. Co. v. Stephens* (Va.), 7 S. E. Rep. 251; see also *Centralia & C. R. Co. v. Rixman*, 30 Am. & Eng. R. R. Cas. 336, note 338.

Same—Consequential Damages.—Respecting consequential damages, see 6 Am. & Eng. Encyc. of L., tit. "Eminent Domain," VI, and VIII, pp. 542-563, 597.

Same—Danger from Fire.—In those cases where the value of buildings for the purpose of a residence, for business, or sale, is diminished by the effect of continual liability to take fire because of proximity of the railroad, such danger entitles the owner to recover damages therefor. *St. Louis, J. & C. R. Co. v. Springfield & N. W. R. Co.*, 96 Ill. 274; *Lafayette, M. & B. R. Co. v. Murdock*, 68 Ind. 137; *Swinney v. Ft. Wayne, M. & C. R. Co.*, 59 Ind. 205; *Kansas City & E. R. Co. v. Kregelo*, 32 Kan. 608; s. c., 20 Am. & Eng. R. R. Cas. 241; *Pierce v. Worcester & N. R. Co.*, 105 Mass. 199; *Colvill v. St. Paul & C. R. Co.*, 19 Minn. 283; *Adden v. White Mts. N. H. R. Co.*, 55 N. H. 413; s. c., 20 Am. Rep. 220; *In re Utica, C. & S. V. R.*, 56 Barb. (N. Y.) 456; *Oregon & C. R. v. Barlow*, 3 Oreg. 311; *Wilmington & C. R. v. Stauffer*, 60 Pa. St. 374.

The increase of the cost of insurance in such cases may also be given in evidence as affecting the amount of damages to be allowed. *Webber v. Eastern R.*, 43 Mass. (2 Metc.) 147; *Wooster v. Sugar R. Valley R. Co.*, 57 Wis. 311; s. c., 10 Am. & Eng. R. R. Cas. 499.

If the danger of fire is so great as to render it necessary to remove the building, the cost of such removal is to be considered in estimating the damages. *Oregon & C. R. Co. v. Barlow*, 3 Oreg. 311.

36 A. & E. R. R. Cas.—41

The fact that the railroad company is responsible for all damages, whether resulting from negligence or otherwise, does not defeat the land-owner's right of recovery. *Keithsburg & E. R. v. Henry*, 79 Ill. 290; *Bangor & P. R. v. McComb*, 60 Me. 290; *Pierce v. Worcester & N. R. Co.*, 105 Mass. 199; *Adden v. White Mts. N. H. R. Co.*, 55 N. H. 413; s. c., 20 Am. Rep. 220; *Somerville & E. R. v. Doughty*, 22 N. J. L. (2 Zab.) 495. But such liability of the company may be taken in consideration as affecting the amount of the damage to be recovered. *Bangor & P. R. Co. v. McComb*, 60 Me. 290.

The danger must be real and imminent, and must be to buildings that are in proximity to the road, not those which are situated at a distance. *Jones v. Chicago & I. R.*, 68 Ill. 380; *St. Louis & S. R. v. Teters*, 68 Ill. 144; *Proprietors of Locks and Canals v. Nashua & L. R. Corp.*, 64 Mass. (10 Cush.) 385; *Hatch v. Cincinnati & I. R.*, 18 Ohio St. 92.

In some states, compensation has been refused. *Lance v. Chicago, M. & St. P. R. Co.*, 57 Iowa, 636; s. c., 5 Am. & Eng. R. R. Cas. 617; *Rodemacher v. Milwaukee & St. P. R.*, 41 Iowa, 297; s. c., 20 Am. Rep. 592; *In re Union Village & J. R. Co.*, 53 Barb. (N. Y.) 457; s. c., 35 How. (N. Y.) Pr. 420; *Wilmington & C. R. v. Stauffer*, 60 Pa. St. 374; *Patten v. Northern Central R.*, 33 Pa. St. 426; s. c., 75 Am. Dec. 612; *Lehigh Valley R. v. Lazarus*, 28 Pa. St. 203; *Sunbury & E. R. v. Hummell*, 27 Pa. St. 99; *Ontario & Q. R. Co. v. Taylor*, 6 Ont. Q. B. Div. 338; s. c., 17 Am. & Eng. R. R. Cas. 100. See also note, 33 Am. & Eng. R. R. Cas. 213; *Cedar Rapids, etc., R. Co. v. Raymond*, 30 Ib. 345, note 348.

CHICAGO, KANSAS AND NEBRASKA R. CO.

v.

WIEBE.

(*Nebraska Supreme Court, January 4, 1889.*)

Appeal—Evidence Without Objection—Review.—Where evidence is introduced without objection to prove certain facts, a party cannot predicate error thereon; and the same rule will apply if a party excepts to the introduction of certain evidence, and afterwards introduces the evidence objected to, or that of a like character.

Same—Evidence In Party's Favor—Review.—An instruction in a party's favor is not ground for reversing a judgment against him.

Eminent Domain—Amount of Damages—Diminution of Value.—In an appeal from the award of damages sustained by a land-owner from the location of a railway across his land, he is entitled to full compensation for the land actually taken, and for such damages to the residue of the land as are equivalent to the diminution in value thereof; general benefits not to be considered.

Same—Instructions.—Instructions sent out in the opinion, *held*, to be substantially correct.

ERROR to District Court, Gage County; APPELGET, Judge.
Action by the Chicago, Kansas & Nebraska R. Co. against

J. G. Wiebe, to condemn the right of way across defendant's land. From a judgment for defendant, plaintiff brings error.

Hazlitt & Bates, and *Stephen S. Brown* for plaintiff in error.

Griggs & Rinaker for defendant in error.

MAXWELL, J.—In August, 1886, the defendant in error was possessed of a strip of land west of Third street, in the city of Beatrice. This trip was about 1000 feet in length and from 126 to 166 feet in width, there being some controversy as to the exact width. This strip, for 558 feet south from the north line, was inclosed with a fence at the date in question, and the defendant in error had in such inclosure a lumber-yard, dwelling house, etc. At the time mentioned, the plaintiff in error instituted proceedings to condemn the right of way across said strip south of the inclosure. The commissioners appointed, after an examination of the property, allowed the defendant in error \$2407. The railway company appealed to the district court, where, on the trial, a verdict was returned for the sum of \$2418.11, with interest from November 4, 1886, amounting in all to \$2584.13. A motion for a new trial having been overruled, judgment was entered on the verdict. A number of objections are made to the introduction of certain evidence; but an examination of the transcript shows that nearly all such evidence was introduced without objection, and that evidence similar to that objected to was introduced by the plaintiff in error. The alleged errors, therefore, cannot be considered. The testimony of the defendant in error, and also that of the plaintiff in error, tends to show that the defendant in error sustained a large amount of damages by reason of the location and construction of the road in question and the verdict being within the values as proved, it will not be disturbed on the ground that the evidence is insufficient. In addition to the evidence preserved in the bill of exceptions which was presented to the jury, the court permitted the jury to view the premises in controversy, and see for themselves the injury occasioned to the defendant in error by the location of the road across his land. A plat accompanying the bill of exceptions shows that the railway is located on a line running northeast and southwest, near the middle of that portion of the tract which is south of the inclosure heretofore spoken of. The railway company contends that the court erred in giving and refusing certain instructions. The objections will be noticed in their order:

The court, at the request of the plaintiff below, instructed the jury "that, in estimating the damages occasioned by the construction of defendant's road through plaintiff's premises, they are not to be limited to damages done to said premises south of the fence running east and west across the same, and near the

middle thereof; but if they believe from the evidence in this case that said premises north of said fence were also damaged by the construction of said road through said premises, they must consider, in fixing the amount of plaintiff's recovery, all damages occasioned by the said construction of said road, to plaintiff's entire premises."

The testimony shows that this land of the defendant in error was not laid off into lots and blocks, the north 558 feet being inclosed. Had there been no inclosure, it cannot be questioned that the defendant in error would have been entitled to damages for the entire tract if such damages were proved. There was testimony tending to show that the location and construction of the road would depreciate the value of the entire premises. This testimony was proper to submit to the jury. The court, in effect, said to the jury that, if they believed from the evidence that the premises north of the fence were damaged by the construction of the road through said land, they might allow for such damages. This, we think, is a correct statement of the law.

Objection is also made to the third instruction, given at the request of the plaintiff below, which is as follows: "The court instructs the jury that, although they may find from the evidence in this case that all property in the vicinity of plaintiff's premises through which defendant's road runs experienced a general increase in value by reason of the construction of the defendant's road, and that plaintiff's premises shared in such general increase, still they must not deduct such increase in the value of plaintiff's premises from the damages done to the said premises by the construction of defendant's road through them, nor are they permitted to consider said increased value of said premises for the purpose of reducing plaintiff's damages." This instruction was correct. All the cases seem to concur in excluding mere general and public benefits which the owner of the land shares in common with the rest of the inhabitants of the vicinity. *Wagner v. Gage Co.*, 3 Neb. 242; *Schaller v. Omaha*, 23 Neb. 325.

Objection is made to the fifth instruction, given at the request of the plaintiff below, which is as follows: "The court instructs the jury that, in estimating plaintiff's damages, they should consider how the taking of plaintiff's land affects the tract, considering the tract as a whole, and just as it was, with all conveniences and franchises which the evidence shows it to have had at the time when the land in question was appropriated." Just what is meant by the "franchises" is not very clear. The remainder of the instruction seems to be unobjectionable, and we are unable

Instruction as
to damages to
entire prem-
ises.

Instruction as
to benefits.

Instruction
referring to
franchises of
tract.

to see that the word "franchises" could in any event prejudice the plaintiff in error. We do not see that the jury could have been misled by the use of the word.

The court also instructed the jury generally upon the question before them, as follows: "The thing for you to determine in this case is the amount of damages plaintiff has sustained by reason of the defendant's appropriation of its railroad right of way over the plaintiff's premises, and the proper construction and operation of such railroad. This damage consists of two elements, namely: (1)

General instruction on question of damages.

The value of the land actually taken, and (2) the damage, if any, to the part of the plaintiff's premises not taken. You should ascertain the value of the part of plaintiff's premises actually taken, and allow that. Then you should determine whether the part taken has been damaged. If you find that a part or parts of the plaintiff's premises through which the railroad right of way was appropriated by defendant, has been damaged by the appropriation, you should ascertain the amount of such damages to the part or parts not taken, and add the same to the value of the part taken; and if that sum is equal to the amount of the assessment of damages in the proceedings in the county court, then you should add interest at 7 per cent per annum from the time of the condemnation, which was August 23d; but if you do not find the amount of the damages to be as much as contained in said assessment below, then you should not add any interest. The damages to the part or parts of the premises not actually taken are to be arrived at without deduction for general benefits to the premises by reason of the building of the railroad, such as are common to and shared in by other lands in that locality that are not damaged, because it would not be just to deprive this plaintiff, whose land is crossed by the railroad, of such general benefits which his neighbors whose lands are not taken get free of charge. (3) Inasmuch as considerable has been said about the street-crossing over the said railroad where it crosses Third street, it is deemed useful to instruct you that the railroad is bound to build and maintain a good and sufficient crossing and approaches over their said railroad, and to conform as near as practicable to grade of said street. If they fail to do so, or have failed to do so, a separate and another action will lie because of such failure; but the same is not a part of this action, whose basis, cause, and foundation are fully and sufficiently stated above in these instructions. If by reason of the railroad's crossing said street, the plaintiff has been deprived of a public right, which he has enjoyed in connection with his premises, and in consequence thereof he sustains damages in excess of that shared by the public generally, he can in another action recover for such excess, but not in this action, which is not only for the damages

to plaintiff's premises by reason of the defendant's appropriation of its right of way through the plaintiff's premises, and the proper consideration and operation of such railroad,—all of which is more particularly stated above."

Objection is made to the first of these instructions because it is too indefinite. But it does not appear to be open to that

Same—Instructions not erroneous.

objection. The second seems to be unobjectionable; while the third is favorable to the plaintiff in error. In assessing damages to a land-owner for a right of way located over his land for a railroad, he is entitled to all the damages which he will sustain by reason of the location, proper construction, and careful operation of the road across the same. *Railroad Co. v. Whalen*, 11 Neb. 585. All such damages, therefore, must be determined in the condemnation proceedings, or they cannot be recovered. But it cannot be assumed in advance that a railway will be improperly constructed or carelessly operated, or, if so, what damages would result from such causes; hence they cannot be considered in the condemnation proceedings. But a cause of action arises in favor of the party when he sustains an injury from the improper construction of the road, or its negligent operation. The instruction complained of, therefore, withdrew from the jury matters in regard to the tract in question which would have been proper for them to consider as affecting its value. The claim here is not for damages to detached real estate, wholly separate from the tract affected by the condemnation proceedings, as it joins to the tract affected, and is one of the conveniences which gives it value. The instruction, therefore, was in favor of the plaintiff in error.

The railway company asked the court to give the following instructions, which were refused: "In assessing the damages in this case, the jury will not take into consideration any trouble, expense, or inconvenience caused plaintiff in error passing along Third street, between his lumber-yard and the B. & M. switch, by any change in the grade of said street made by defendant in the construction of its railroad across said street, nor any other damage which they may believe was caused by such change of grade. The jury will take into consideration only such damages as result to plaintiff's land by the taking and appropriating of a portion thereof, for the purpose of the construction, maintenance, and operation of a railroad thereon, and not such damages as may be sustained by plaintiff, in common with other persons in the community no portion of whose lands are taken for the construction, maintenance, or operation of plaintiff's road." It will be observed that the first part of the first of said proposed instructions had already been given, and that the latter part, "nor any other damages which they may

believe was caused by such change of grade," is entirely too vague and indefinite, and was calculated to mislead the jury. The court, therefore, did not err in refusing the first of said proposed instructions.

The second instruction asked is open to the same objection as the other; and in addition to this, there is no testimony as to the damages sustained by other parties from the causes alleged. The court did not err, therefore, in refusing the second instruction asked. The law relating to damages for right of way should be so construed as to do justice between the parties. A railway company has an almost unlimited right in locating its lines. The land-owner has but little choice in the matter, as the statute authorizes a corporation, formed under the laws of the state, to take, hold, and appropriate so much real estate as may be necessary for the location, construction, and convenient use of its road." Therefore, if it is necessary, in the location of a railroad, to cross a farm or plot of ground in such a way as to mar its beauty or greatly diminish its value, the land-owner must submit, because the public good requires that he shall do so. The law, however, guarantees him just compensation for his property taken or damaged. Now, when is a party justly compensated for injuries sustained? The answer must be, only when he has been fully paid for such injuries. In *Schaller v. Omaha*, 23 Neb. 332; 36 N. W. Rep. 533, it was held that the words "just compensation for property damaged" were just as broad in signification as where the property was taken. It is said a "different rule injects words into the constitution which are not found there, and puts a forced construction upon its language." In that opinion the history of the amendment is given from the writer's personal knowledge of the subject. The amendment was not copied from any other constitution, but was inserted to secure justice; and this court will endeavor so to construe it as to give to every one his just rights. The measure of damages, therefore, as stated by the court in its instructions, appears to be correct; and as two juries of the county, from personal inspection of the premises, have returned verdicts for nearly the same amounts, we must presume from these facts, as well as from the evidence before us, that the verdict is correct. There is no material error in the record, and the judgment is affirmed. The judges concur.

Eminent Domain—Diminution of Value.—Where property has been injuriously affected but not part of it taken, the owner is entitled to recover for those injuries which are direct in their nature, and which are peculiar to him. See *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 290; *Ham v. Wisconsin, I. & N. R. Co.*, 61 Iowa, 716; s. c., 14 Am. & Eng. R. R. Cas. 204; *Rogers v. Kennebec & P. R. Co.*, 35 Me. 319; *Prestrey v. Old Colony & N. R. Co.*, 103 Mass. 1; *Chicago, M. & E. R. Co. v. Ritter*, 10 Am. & Eng. R.

R. Cas. 222; Gulf, C. & S. F. R. Co. v. Fuller, 63 Tex. 467; s. c., 22 Am. & Eng. R. R. Cas. 154.

Where the value of the premises is reduced on account of an obstruction caused by a public improvement, the measure of damages is the diminution in value caused by such obstruction. See *Hot Springs R. Co. v. Tyler*, 36 Ark. 205; s. c., 10 Am. & Eng. R. R. Cas. 145; *Blesch v. Chicago & N. W. R. Co.*, 43 Wis. 183; *Chapman v. Oshkosh & M. R. Co.*, 33 Wis. 629. See *Gear v. C. C. & D. R. Co.*, 39 Iowa, 23.

Same—Diminution of Business.—In an action for damages resulting from the construction of a railroad across plaintiff's hotel property, evidence that the construction of the road will diminish the business of the hotel is admissible only to aid the jury in determining the weight of direct testimony of depreciated value. *Lafin v. Chicago, W. & N. R. Co.*, 33 Fed. Rep. 415.

CARROLL

v.

WISCONSIN CENTRAL R. CO.

(*Minnesota Supreme Court, February 11, 1889.*)

Eminent Domain—Consequential Damages—Noise and Smoke.—No action lies against a railroad company for the inconveniences necessarily caused to premises in the vicinity, by noises, smoke, jarring of the ground, etc., arising from properly and prudently operating its railroad upon its own lands, or upon land in which the party complaining has no interest.

• **APPEAL** from District Court, Ramsey County; BRILL, Judge.

Action by James Carroll against the Wisconsin Central R. Co., for injuries resulting to plaintiff from the operation of the road. Judgment for defendant, and plaintiff appeals.

S. L. Pierce for appellant.

Lusk & Bunn for respondent.

GILFILLAN, C. J.—Previous decisions of this court fully dispose of the question presented in this case. We will refer to two of them. In *Rochette v. Railway Co.*, 32 Minn.

Previous decisions deciding question.

201; s. c., 17 Am. & Eng. R. R. Cas. 192, it was held that no action by a land-owner lies for the damage or inconvenience caused to his land in consequence of a railroad company lawfully constructing its road across a highway (not opposite his land) in such manner as to render access to his land more inconvenient. The reason on which the decision proceeded was that in such case the injury sustained by him is not special to him, but is the same in kind, though perhaps greater in degree, as is sustained by the public at large.

The effect of sections 14, 17, 18, ch. 34, Gen. Stat. 1878, was considered, and they were held not to give any new cause of action. In *Adams v. Railroad Co.*, 36 Am. & Eng. R. R. Cas. 7, a railroad had been lawfully and properly constructed along in the street on which plaintiff's lot abutted, but beyond the centre line of the street, and was operated in a prudent and proper manner. It was decided that the owner of a lot abutting on a street has, without regard to the ownership of the soil, as appurtenant to his lot, an easement in the street to the full width thereof, for the admission of light and air to his lot, which easement is subordinate only to the public right; that the operating of a railroad in the street opposite his lot, lawfully and properly constructed (but without making compensation to him), and carefully and properly operated, if it darkens the light and pollutes the air coming upon his lot from that part of the street, is an injury special to him, and not common to him and the public at large; but that his claim to damages for such inconvenience is confined to those caused by operating the railroad directly in front of his lot, and does not extend to those caused by operating it on any other part of the street. A new trial was ordered because the trial court admitted evidence of damage which took in the inconveniences caused by operating the railroad on parts of the street to which plaintiff's easement did not extend. The principle upon which the decision rested is stated: "It is well settled that, where there is no taking of or encroachment on one's property or property rights by the construction and operating of a railroad, any inconveniences caused by it, as from noises, smoke, cinders, etc., not due to improper construction, or negligence in operating it, furnish no ground of action, as when the railroad is laid wholly on land which the company has acquired by purchase or condemnation." We are not cited to any case deciding the contrary of this proposition, nor do we know of any. Railroads are a public necessity. They are always constructed and operated under authority of law. They bring to the public great benefits; to some persons more, to other persons less. The operating them in the most skilful and careful manner causes to the public necessary incidental inconveniences, such as noise, smoke, cinders, vibrations of the ground, interference with travel at the crossings of roads and streets, and the like. One person may suffer more from these than another: for instance, one whose premises lie within a hundred feet of the railroad will feel the inconveniences in a greater degree than one whose premises are at the distance of a thousand feet; and one who has to pass many times a day along a street crossed by a railroad suffers more inconvenience from it than one who seldom has occasion to pass. But the difference is only in degree, not in kind. Such inconveniences are com-

mon to the public at large. If each person had a right of action because of such inconveniences, it would go far to render the operating of railroads practically impossible. As the court said in the Rochette Case: "No law ever proposed to give indemnity for all losses occasioned by the construction of railroads and other public improvements; if it did, it would extend indefinitely." Order affirmed.

Eminent Domain—Consequential Damages.—See, *ante*, *Centralia & C. R. Co. v. Brake et al.*, and note.

Same—Noise and Smoke, Dust, and Vibration.—Where the construction of a public improvement fills the atmosphere with smoke, gases, ashes, cinders, or other foreign substances, thereby affecting and impairing the property of the air, this constitutes an injury affecting the property, for which the owner may recover compensation in damages. See *Jeffersonville, M. & I. R. Co. v. Esterle*, 13 Bush. (Ky.) 667; *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *Walker v. Old Colony*, 103 Mass. 10; s. c., 4 Am. Rep. 509; *Drucker v. Manhattan R. Co.*, 106 N. Y. 157; s. c., 60 Am. Rep. 437; *Lahr v. Metropolitan E. R. Co.*, 104 N. Y. 268, 295; *Caro v. Metropolitan E. R. Co.*, 46 N. Y. Super. Ct. (14 J. & S.) 438; *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325; *Brand v. Hammersmith & C. R. Co.*, L. R. 2 Q. B. 223; *East & West India Docks, etc., v. Gattke*, 3 Mac. & G. 155.

There is a lack of uniformity in the decisions on this point, quite a number of them holding a contrary doctrine, among which are the following: *Mix v. Lafayette, B. & M. R. Co.*, 76 Ill. 319; *Dimmick v. Council Bluffs & St. L. R. Co.*, 62 Iowa, 409; s. c., 10 Am. & Eng. R. R. Cas. 105; *Atchison & M. R. Co. v. Garside*, 10 Kan. 552; *Cogswell v. New York, N. H. & H. R. Co.*, 48 N. Y. Super. Ct. (16 Jones & S.) 31; *Halsten & T. C. R. Co. v. Odum*, 53 Tex. 343; *City of Glasgow U. R. Co. v. Hunter*, L. R. 2 H. L. Sc. App. 78.

The inconvenience and annoyance occasioned by noise and the confusion of passing trains is an injury which will be compensated in damages. *Little Rock, M. R. & T. R. Co. v. Allen*, 41 Ark. 431; *Mix v. Lafayette*, 67 Ill. 319; *Wilson v. Des Moines, O. & S. R. Co.*, 67 Iowa, 509; *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *County of Blue Earth v. St. Paul & S. C. R. Co.*, 28 Minn. 503; *First Baptist Church of Schenectady v. Schenectady, T. & D. R. Co.*, 5 Barb. (N. Y.) 79; *White v. Charlotte & S. C. R. Co.*, 6 Rich. (S. C.) L. 47; *Gulf C. & S. F. R. Co. v. Eddin*, 60 Tex. 656. However, a contrary opinion is maintained in several well-considered cases. See *Republican Valley R. Co. v. Lynn*, 15 Neb. 234; s. c., 14 Am. & Eng. R. R. Cas. 198; *Hammersmith & C. R. Co. v. Brand*, L. R. 4 H. L. Cas. 176; *City of Glasgow U. R. Co. v. Hunter*, L. R. 2 H. L. Cas. Sc. Ap. 78.

The vibration and jarring of property resulting from the construction of a railroad and the running of trains thereon, is a proper subject of damages. See *Henderson v. New York C. & H. R. R. Co.*, 17 Hun (N. Y.), 344; *In re, N. Y. C. & H. R. R. Co.*, 15 Hun (N. Y.), 63; *Cohen v. City of Cleveland*, 43 Ohio St. 190; s. c., 9 Am. & Eng. Corp. Cas. 405; *Croft v. London & N. W. R. Co.*, 3 Best & S. 436; s. c., 113 Eng. C. L. 435. Compare *Penny v. Sou. E. R. Co.*, 7 El. & Bl. 660; s. c., 90 Eng. C. L. 658.

See, generally, *Cogswell v. New York, N. H. & H. R. Co.*, 27 Am. & Eng. R. R. Cas. 376; note to *Chicago & E. R. Co. v. Blake*, 24 Ib. 293; *Republican V. R. Co. v. Linn*, 14 Ib. 198; *Rowan v. Atlantic, etc., Co.*, 14 Ib. 332.

BELL'S EXRS.

v.

NORFOLK SOUTHERN R. CO.

(*North Carolina Supreme Court, October 8, 1888.*)

Eminent Domain — Compensation — Consequential Damages—Surface-waters.—Where the right of way across lowlands, and also a section on a lead-ditch thereon, have been condemned and paid for, including the legal incidental damages to the lands not taken, and it appears in evidence, in an action to recover damages for flooding adjoining lands, that the company has cut on such appropriated lands ditches necessary to drain the roadbed and for safety of travel over the road, and that the plaintiff might have relieved his land of the increased volume of water drained into his lead-ditch by cutting the same deeper,—it was not error to refuse to direct a verdict for the plaintiff.

Same—Surface-water—Damages to Adjacent Lands—Damnum Absque Injuria.—If, in the lawful and frightful use of its easement by a railroad company, the surface-water damages adjacent land, it is *damnum absque injuria*, for which the owner cannot recover as for a tort.

APPEAL from Superior Court, Currituck County.

Facts sufficiently set forth in the opinion.

Grandy & Rydlett for appellants.

Pruden & Vann and *Starke & Martin* for appellee.

DAVIS, J.—Civil action, originally commenced by the testator of plaintiffs, to recover damages alleged to have been caused by the flooding of his land by the act of the defendant company in constructing its roadbed, tried before Montgomery, J., at spring term, 1888, of Currituck superior court. By consent, the issue "What damage the plaintiff sustained?" was submitted to a jury, and as to all other issues and facts a jury trial was waived, and it was agreed that they might be passed upon by the court. The response to the issue submitted to the jury was "\$700;" and the court found the following facts, to wit: The plaintiff's testator owned the land and lead-ditch described in the complaint. The defendant, in locating and constructing its roadbed, cut across said ditch, and also cut ditches by the side of its roadbed, to get dirt for the roadbed, and also to drain the roadbed. In constructing its roadbed, the defendant cut across the embankment or dirt on the side of the lead-ditch. By means of the locating and constructing of said roadbed, more was drained into plaintiff's ditch than it could carry off, and the plaintiff's land was flooded and in-

Facts.

jured thereby. The water thus carried by the defendant's ditches was surface-water, except occasionally, after heavy rains, the water from the Dismal Swamp would spread out over the surface from the ditch. There was no natural or artificial drain for these waters. The "lead-ditch" was sufficient to drain plaintiff's land till defendant constructed its road. The lands of plaintiffs, over which the defendant constructed its roadbed and ditches, and also a section or part of the lead-ditch, had been condemned by regular proceedings under the statute, and damages for the land taken, and the legal incidental damages to the lands not taken had been assessed and paid to him by the defendant. The defendant did not locate and construct its roadbed, or dig any ditch, outside or off the lands which had been condemned and paid for. The ditches cut by defendant were necessary for the purpose of the roadbed for the road, and for the safety of travel over the road; and the roadbed could not have been drained in any other way. The plaintiff could have obviated the difficulty, or relieved his land of this increased volume of water, drained into his lead-ditch, by cutting the same deeper. The plaintiffs, upon the above facts and issue, moved for judgment for \$700 and costs. The court refused the motion, and, upon defendant's motion, granted judgment for defendant. The plaintiffs excepted, and, from the rulings and judgment, appealed to supreme court.

There is no error. It is found as a fact that the ditches of which the plaintiff's complain were necessary for the purposes of the roadbed; that the roadbed could not have been drained in any other way; and that they were not outside or off of the land which had been condemned and paid for by the defendant, including "the legal incidental damages to the lands not taken." Every one has the right properly to use his own; and without this drainage for the surface-water, the defendant's right of way, for which the plaintiffs had been paid, would have been of no value; and if, as an incidental consequence of the lawful and rightful use of its easement by the defendant company, the surface-water damages the land of the plaintiffs' testator, it is *damnum absque injuria*, and for which he cannot recover as for a tort. *Railroad Co. v. Wicker*, 74 N. C. 220. It is no infringement of the maxim, "*Sic utere tuo ut alienum non ledas*." Washb. Easem. 455. It was said in *Wiley v. Railroad Co.*, 98 N. C. 263, speaking of the condemnation of the right of way: "Everything necessary and incident to the original making and subsequent operating the road must be intended to have passed as against the owner of the condemned land,"—and the right to cut such ditches on the condemned land as will protect the roadbed against accumulating surface-water is a necessary in-

Consequential
damages—Sur-
face waters.

cident. The water drained by the defendant's ditches was all surface-water, except occasionally, after heavy rains, the water from the Dismal Swamp would spread over the surface of the ditch. There was no natural or artificial drain to the Dismal swamp, and the ditches were not designed to drain it, and the overflow was none the less of surface-water, which, we apprehend, could not have been caused or prevented by the ditches. In *Railroad v. Wicker*, *supra*, a distinction is taken between diverting or obstructing a natural or artificial drainway, and one by which surface-water is drained. In the latter, in measuring the compensation to the land-owner, the resulting damage should be estimated; and this was one of "the legal incidental damages" which had been assessed and paid for, as found by the court. In the former, it is the duty of the company, in constructing its roadbed, to provide for the discharge of the water through its accustomed drainway, whether natural or artificial. No error.

Eminent Domain—Consequential Damages—Surface-waters.—See, *ante*, *Wabash, St. L. & P. R. Co. v. McDougall*. For a full description of the subject of surface-waters and the classification of the conflicting decisions, see note to *Philadelphia, W. & B. R. Co. v. Davis* (Md.), 34 Am. & Eng. R. R. Cas. 148-156; also *Olson v. St. Paul, M. & M. R. Co.* (Minn.), 34 Am. & Eng. R. R. Cas. 152.

LEROY AND WESTERN R. CO.

v.

ROSS *et al.*

(*Kansas Supreme Court, January 5, 1889.*)

Eminent Domain—Assessing Damages—Benefits—Constitutional Law.—Under the provisions of section 4, art. 12, of the constitution of the state, a railroad company must make full compensation for the right of way appropriated to the corporation, irrespective of any benefits or supposed benefits from the construction of the road, or any improvement thereby. (Following *Railroad Co. v. Orr*, 8 Kan. 419; *Hunt v. Smith*, 9 Kan. 137; *Reisner v. Railroad Co.*, 27 Kan. 382.)

Same—Evidence of Value—Opinion Evidence.—A farmer not engaged in buying and selling real estate, not knowing the market value of real estate, not living in the neighborhood of the land inquired about, and who does not know its situation and fertility, its advantages and disadvantages, cannot, as a witness, give his evidence as to the value of the land before and after the appropriation of the right of way by a railroad company. A farmer conversant with the land as to its situation, soil, advantages, etc., is competent as a witness to the value, as having particular knowledge of the facts in issue.

Same—Elements of Damage—Instructions.—Where a railroad is laid through a farm or tract of land used for stock purposes or adapted to stock purposes, the accidental danger to which stock thereon will be exposed may be considered in giving compensation to the land-owner for the right of way appropriated for the railroad, so far as the same affects the value or depreciation of the farm or tract of land. The jury, however, should be instructed not to consider any danger or probable injury to stock, resulting from the fault or negligence of the railroad company in operating or failing to fence its road; but in the absence of any evidence showing that the farm or tract of land has stock thereon or is adapted to stock purposes, an instruction to consider the increased risk, or the probability of stock upon the premises being accidentally killed or injured in the operation of the railroad, is misleading and erroneous.¹

Same—Danger from Fire—Rental Value.—When a part of a farm or a tract of land is appropriated for the right of way of a railroad, danger from fire to buildings, fences, timber, or crops upon the remainder, in so far as it depreciates the value of the property, may be properly considered in giving compensation to the land-owner; but as tending to show the depreciation in the value of the property by reason of the danger from fire, all the facts in regard to the situation of the property and improvements relative to the railroad should be introduced in evidence. The distance from the road to which the danger extends may also be shown. In the absence of all evidence tending to show a decrease in the rental value of the premises, or any increase in cost of insurance on account of the danger from fire, and in the absence of all evidence tending to show any depreciation in the value of the property by reason of such danger, an instruction to the jury to consider accidental danger from fire to the premises, resulting from the operation of the road, will be misleading and erroneous. When there is sufficient evidence upon which to base instructions to the jury to consider, in so far as it depreciates the value of the property, accidental danger from fire to buildings, etc., the jury should also be instructed that they should only take into consideration the risk or exposure to fire set out by trains and engines, without the fault or negligence of the company. If a fire occurs through the fault or negligence of the company, its servants, or employees, the company is liable therefor; and, under the statute of this state, fires from trains or engines in the operation of a road are *prima facie* evidence of negligence on the part of the company.¹

ERROR to District Court, Sedgwick County.

The facts sufficiently appear in the opinion.

Geo. R. Peck, A. A. Hurd, and Houston & Bentley for plaintiff in error.

Sluss & Stanley for defendants in error.

¹ In condemnation proceedings to take land for railroad purposes, the danger to buildings, fences, etc., from fire caused by the operation of the railroad, where the value of the land will be depreciated thereby, is a proper element of damages to be considered. *Railroad Co. v. Brake* (Ill.), 17 N. E. Rep. 820. See also cases cited in note. In general, as to what elements of damage may be considered in awarding compensation in condemnation proceedings, see *Railway Co. v. Hollis* (Kan.), 18 Pac. Rep. 947, and cases cited; *In re Rugheimer*, 36 Fed. Rep. 376, and cases cited; *Blakely v. Railroad Co.* (Neb.), 40 N. W. Rep. 956; *Railway Co. v. Story* (Mo.), 10 S. W. Rep. 203.

HORTON, C.J.—Ross and Packer are the owners of the S. W. $\frac{1}{4}$ of section 25, township 29, range 2 W., in Sedgwick county. On the 15th day of March, 1886, the district judge of that county appointed commissioners to appraise the lands along the line of the Leroy & Western R. Co. through the county, and to assess the damages for the right of way of the road. On the 26th day of April, 1886, the commissioners, after viewing the said southwest quarter, and the proposed route of the railroad over the land, assessed the damages as follows: Value of land taken for right of way, \$120.50; damage to land not taken, \$50; damage to crops, \$8; aggregating \$178.50. The right of way cut off from the north side of the quarter about six acres of land. This six-acre strip is a long, wedge-shaped piece, at the lower end about two hundred yards wide, running to a point nearly eight rods in length. At the trial the jury assessed the damages at \$812, and judgment was rendered accordingly. The railroad excepted, and brings the case here.

Facta.

Upon the trial, the railroad company requested the court to give the following instruction: "You are instructed, in assessing the amount of plaintiff's recovery, that you may take into consideration any benefits by reason of construction of railroad through the premises of plaintiff, which may be special and peculiar to the tract of land in question; that is, benefits different from and in excess of benefits resulting to other adjoining land not intersected by the railroad." The court refused the request, holding that benefits, although special, could not be set off against the value of the strip taken for the right of way, or against the damages to the remainder of the land. It is conceded by all the parties that neither general nor special benefits can be set off against the value of the strip or part taken for the right of way. The question is therefore presented, whether special benefits from the construction of the railroad or any improvement thereby may be set off against the damages to the remainder of the land. If it were not for the provisions of the constitution of the state, as a matter of justice, the benefits, direct and special, to the landowner, should be charged in making the estimate of the amount to which he is justly entitled for the appropriation of the right of way. *Railroad Co. v. Kuhn*, 38 Kan. 675-678; 33 Am. & Eng. R. R. Cas. 159.

**Compensation
—Benefits—
Constitutional
law.**

Under the constitution, are such benefits to be deducted or allowed from the compensation required to be paid? Section 4, art. 12, of the constitution ordains: "No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, . . . irrespective of any benefit from any improvement." This section of the constitution was referred to and construed 17 years ago, in

Railroad Co. v. Orr, 8 Kan. 419. It was said in that case: "The plaintiff in error offered evidence to show that benefits accrued to the land of appellant by reason of building the road. The court refused to permit any evidence on that point to go to the jury, and correctly. Section 4, art. 12, of the constitution is conclusive on this point." The writer of that opinion was Kingman, late chief justice. As he was a member of the constitutional convention of 1859, and the chairman of the committee upon judiciary in the convention, this decision is entitled to great consideration. In *Hunt v. Smith*, 9 Kan. 137, Mr. Justice Valentine, following the case of *Railroad Co. v. Orr*, *supra*, said: "Such commissioners must appraise the value of the land appropriated, and assess the damages to that not appropriated (not actually taken), irrespective of any supposed benefits to that not appropriated (not actually taken)." In *Reisner v. Railroad Co.*, 27 Kan. 382 ; s. c., 10 Am. & Eng. R. R. Cas. 155, it was said: "Under the provisions of section 4, art. 12, of the constitution of the state, a railway company must pay for the right of way, irrespective of any benefit from the proposed improvement of the company; and the compensation for such right of way appropriated to the use of the company includes not only the value of the property taken, but also the loss the land-owner sustains in the value of his property by being deprived of a portion of it." This construction of the constitution is fully sustained by the decisions of other states having similar constitutional provisions.

In *Pierce R. R.*, 222, it is said: "The deduction of benefits in the assessment of damages is prohibited by the constitutions of some states (as Ohio, Kansas, and Alabama), and by statutes in other states."

Section 18, art. 1, of the Iowa constitution in force in 1871 is in the following words: "Private property shall not be taken for public use without just compensation first being made or secured to be made to the owner thereof as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken." In *Frederick v. Shane*, 32 Iowa, 254, it was held that, "In the assessment of damages an individual sustains in the location of a road over his lands, the jury cannot, under article 1, § 18, of the state constitution, take into consideration any advantage or benefit that may result to the owner by reason of the establishment of the road, as that it would tend to drain and improve the land." See also, to the like effect, *Brooks v. Railroad Co.*, 37 Iowa, 99.

In Arkansas, section 9, art. 12, of the constitution of 1874, provides that compensation must be made in money, and be ascertained irrespective of any benefits from the proposed im-

provement. Under that provision, in *Railroad Co. v. Anderson* 39 Ark. 167, it was said: "The owner's damages for the right of way to a railroad over his land cannot be diminished by the estimated benefit likely to accrue to his remaining property by the building of the road."

In Indiana, in 1858, and also in 1873, the statute declared that "In estimating any damages [for the appropriation of land for the right of way of a railroad], no deduction shall be made for any benefit that may be supposed to result to the owner from the contemplated work." In *Railroad Co. v. Fitzpatrick*, 10 Ind. 120, the court decided that under the statute "The jury, in determining the amount of damages, are to exclude from their consideration all future benefits that may accrue to the owner of the land from the construction or operation of the road." See also *Railroad Co. v. Horn*, 41 Ind. 479.

It is contended, however, that as the provisions of our constitution concerning right of way were taken from the constitution of Ohio, the decisions of that state prior to the adoption of our constitution must control. To this we agree, and the result is the same as given above. In *Giesy v. Railroad Co.*, 4 Ohio St. 308, it was said: "The jury, in assessing the amount, have no right to consider or make any use of the fact that it has been increased in value by the proposal or construction of the improvement." The opinion in that case was delivered by Ranney, J., one of the ablest of the Ohio judges. He said, among other things: "The word 'irrespective' relates to this full compensation, and binds the jury to assess the amount without looking at or regarding any benefits contemplated by the construction of the improvement. When this is done, and this consideration wholly excluded, the jury have nothing to do but ascertain the fair market value of the property taken; which is but saying that nothing shall be deducted from that value on account of such benefits." In *Railroad Co. v. Ball*, 5 Ohio St. 568, it was said: "After the testimony was closed, the court was requested by the counsel for the plaintiff in error to charge the jury, among other things, as follows: '(3) That it is proper for the jury to consider the benefits, by reason of the appropriation, to the residue of the tract through which the appropriation is made, for the purpose of determining whether such residue is injured by the appropriation. (4) That if the jury are of opinion that the whole of the residue of the tract through which the appropriation is made is not diminished in value by the appropriation, that no damages are to be assessed for any injury which it may be claimed is done by the appropriation to such residue.' These instructions the court refused to give to the jury; . . . and as to the third point requested, the court charged the jury, 'That, by the constitution

of the state, and their oaths, they were required to assess the defendant's damages, or the amount of his compensation, irrespective of any benefit proposed by the plaintiff as a railroad company, and that they were to exclude all real or imaginary benefits from their consideration.' As to the fourth point requested, the court charged the jury 'That the constitution of the state provided that the compensation shall be assessed by the jury without deduction of benefits to any property of the owner. That to charge the jury as requested would be asking them to disregard this provision of the constitution, as well as article 13, § 5, which provides that the compensation made to the owner of the property shall be irrespective of any benefits from any improvement proposed by said corporation.'" The supreme court, Bartley, C. J., delivering the opinion, said there was no error in the instructions of the court to the jury. There was something said in the opinion that, where a local benefit or advantage was blended with a local incidental injury, the jury might consider the same; but it was not decided in that case that the owner, for local incidental injury to the residue of his land, could be allowed any deduction for the separate local benefit. Both of the Ohio decisions referred to were rendered only a few years prior to the adoption of our constitution. The case of *Kramer v. Railroad Co.*, 5 Ohio St. 140, cited as supporting the allowance of special benefits, was made under the Ohio constitution of 1802, and not the constitution in force at the time of the adoption of our own. The Ohio constitution of 1802 permitted the railroad to set off, against the value of the property taken for public use, the increased benefits arising from the improvement, and it therefore differed widely from the Ohio constitution in force in 1859.

It is contended, however, by the railroad company that, as this court, in *Railroad Co. v. Blackshire*, 10 Kan. 477, recognized that the fair way of determining the injury for the appropriation of a right of way is to determine the market value of the premises before the right of way is set apart, and then again after, and that the difference will be the true measure of damages, and as this rule has also been followed by the court in many cases,—that this permits benefits to be considered, and therefore that the construction given to the constitutional provisions already referred to cannot be sustained. If this latter rule permitted separate benefits to be considered, so far as they affect the value of the premises injured, we suppose the rule must give way to the provisions of the constitution, which all concede are paramount. But this rule does not conflict with our construction of the constitutional provision, excepting in a few cases only; and the conflict is more theoretical than substantial. The jury do not generally consider benefits when they ascertain the market value of

the land before the appropriation, and then the market value of the land after the appropriation or construction of the railroad, and determine the difference as the damages. But even if the rule in the Blackshire Case is not always accurately correct, the railroad company cannot complain of the adoption of the rule, because, under its construction, it is beneficial, not detrimental.

We have already held that farmers living in the neighborhood of the land in question, well acquainted with its situation and fertility, its advantages and disadvantages, are qualified to state their opinions in regard to its value before and after the road was constructed through it.

Evidence of
value—Opin-
ions of farm-
ers.

Such witnesses are competent, not strictly as experts having peculiar skill and scientific attainments, but as persons having particular knowledge of the facts in issue. We are not inclined to extend the rule in regard to this character of evidence; therefore the opinion of no farmer not living in the neighborhood of the land, and not acquainted with its situation and fertility, its advantages, disadvantages, etc., ought to be received in regard to the value of the land. Farmers not employed in buying and selling real estate, and having no knowledge of the facts in issue, ought not to be permitted to give their opinions from an examination of a map of the route of the road, or upon hearsay evidence only. *Railway Co. v. Hawk*, cited *post*. Several of the witnesses, who were farmers, were permitted to testify the amount, in their judgment, per acre that the land would be depreciated by reason of the location of the road across it. This class of evidence is not to be commended, and falls very nearly within the objections stated in *Railroad Co. v. Kuhn*, 38 Kan. 675-77; 33 Am. & Eng. R. R. Cas. 159. The opinion filed upon a motion for a rehearing in that case corrected the second part of the syllabus reported in 38 Kan. 104; 16 Pac. Rep. 75. Witnesses, competent therefor, may give their opinions as to the value of the property appropriated for right of way, but not as to the amount of damages caused thereby. They may testify to the market value of the property before the right of way is set apart, and then again after, but any violation of this rule, prejudicial to the interests of the opposing party, perils a favorable verdict. In *Railway Co. v. Paul*, 28 Kan. 816; s. c., 10 Am. & Eng. R. R. Cas. 490, where two witnesses were allowed to state what per cent the property was damaged by the appropriation of the right of way, the judgment was not reversed, but there were many other things stated in the opinion, tending to show that the evidence of these two witnesses alone was not sufficiently prejudicial, even if erroneous, to require a new trial. Neither the syllabus nor opinion, however, fully justifies the admission of such evidence. See *Railway Co. v. Allen*, 24 Kan. 38; 5 Am. & Eng. R. R. Cas. 362;

Roberts *v.* Commissioners, 21 Kan. 247; Railroad Co. *v.* Kuhn, *supra*.

It is objected that the court instructed the jury that they might take into consideration the increased risk or exposure by fire on the plaintiff's premises which might accidentally result from the operation of the road through the same; and also that they might consider the increased risk or probability of stock upon the premises being killed or injured as the result of accident, for which the company would not be responsible. The design of the law is to fully compensate the land-owner for all injury he may sustain by reason of the appropriation of his land to the use of the road, and which shall grow out of or be occasioned by its location and use at that place. This being true, it follows that it is proper for the jury to consider whether his stock would be liable to be accidentally killed, or his crops, fences, and buildings destroyed by fire, without fault on the part of the railroad company. If there was a liability to such injuries, its tendency would be to depreciate the value of the farm in its use as well as in the market. It must be borne in mind that these things are proper to be considered so far only as they tend to depreciate the value of the farm or tract of land. Railroad Co. *v.* Kregelo, 32 Kan. 610; 20 Am. & Eng. R. R. Cas. 249; Weyer *v.* Railroad Co., 68 Wis. 180; Railway Co. *v.* Teters, 68 Ill. 144; Lewis Em. Dom. §§ 496, 497; Mills Em. Dom. (2d ed.) §§ 162, 163. But instructions concerning the danger to which the stock thereon will be exposed, so far as the same affects the value of the farm, or instructions concerning danger from fire to buildings, fences, timber, or crops upon the remainder of the land, in so far as it depreciates the value of the property, ought not to be given unless there is evidence introduced in the case upon which to found such instructions. In this case there is scarcely any, and perhaps we may say no, evidence tending to show any special facts of depreciation in the value of the property from danger from fire or from danger to stock.

Chief Justice Shaw, in Proprietor *v.* Railroad Corp., 10 Cush. 385, expressed the opinion that danger from fire may enter into the estimate of damages, if the danger be "imminent and appreciable." Where, however, the house and other buildings on the premises are distant from the right of way, and beyond real danger from the operation of the road, no compensation for danger from fire to those buildings should be allowed. If crops or any improvements are in such close proximity to the railroad as to render danger from fire "imminent and appreciable," then of course this matter should be considered. Webber *v.* Railroad Co., 2 Metc. 147; Hatch *v.* Railroad Co., 18 Ohio St. 92. The danger of exposure of buildings, fences, timber, or crops from

fire is an entirely different question from that involved in its destruction by fire without fault of the company. In the one case, while the risk or exposure may somewhat decrease the value of the property, and is a legitimate consideration for what it may be worth in fixing the compensation to the owner, in the other case the destruction of buildings, fences, timber, or crops by fire is a field of inquiry so remote and contingent as to be without and beyond any range of damages known to the law. *Lance v. Railroad Co.*, 57 Iowa, 636.

In this case it appears from the evidence that there was a house and barn somewhere upon the farm; but we cannot tell from the evidence how near they were to the railroad or right of way. Very little is testified to about any crops upon the farm along or in the vicinity of the right of way. No evidence was offered tending to show a decrease in the rental value or increase of the cost of insurance of the property, whereby it was depreciated by reason of danger from fire from passing trains. If instructions regarding danger from fire to buildings, crops, etc., were deemed necessary, evidence should have been offered showing all the facts in regard to the situation of the property and improvements relative to the railroad. The distance from the road to which the danger from fire extends might also have been shown. Again, if special instructions were deemed important concerning the increased risk or probability of stock upon the premises being accidentally killed or injured, then evidence should have been offered that the farm or land was used for stock purposes, or that it was specially adapted for those purposes. If a railroad runs through a farm used for agricultural purposes only, or runs through a lot in a city or village, where stock are not kept, an instruction concerning the danger to which the stock upon the property will be exposed, would be misleading and erroneous. In the absence of evidence tending to show danger from fire or danger to stock, special instructions asking the jury to consider these things should not be given. In this state, the necessity of showing special facts upon which to base instructions concerning exposure to fire and danger to stock by the operation of a railroad are more important than in many states, because in this state a railroad company is not only responsible for all fires which occur through the negligence of the company, its servants, or employees, but the statute makes the setting out such fires in the operation of a railroad *prima facie* evidence of negligence on the part of the company. Section 101, c. 84, Comp. Laws 1885; *Railroad Co. v. Kregelo*, *supra*. In this state railroad companies are responsible to the land-owner or occupant for all injuries negligently done to stock by the company, its servants, or employees; and are also liable for all injuries to stock caused by the road not being fenced through the land.

Sections 28, 30, 34, c. 84, Comp. Laws 1885. There is therefore only the risk or exposure by fire, and the risk or exposure of stock, to be considered, when such risk or exposure occurs without fault or negligence on the part of the railroad company. As to what particular questions of fact should have been submitted to the jury, see *Railroad Co. v. Fechheimer*, 36 Kan. 45; *Railway Co. v. Hawk*, 39 Kan. 638.

For the errors referred to, the judgment of the district court will be reversed and the cause remanded for a new trial; all the justices concurring.

Eminent Domain—Assessing Damages—Benefits.—As to setting off benefits derived against damages sustained in the appropriation of private property under the power of eminent domain, see a full collection of the cases, *ante*, *Whitley v. Mississippi*, W. P. & B. R. Co., and note.

Same—Evidence—Opinion evidence.—In the estimation of damages sustained by a land-owner, see, *post*, *Sigafoos v. Minneapolis, L. & M. R. Co.*, and note; *Wichita & W. R. Co. v. Kuhn*, 33 Am & Eng. R. R. Cas. 159, note 161.

Same—Elements of Damages—Danger from Fire.—As to the elements of damages, see, *ante*, *Kansas City, C. & S. R. Co. v. Story*, and note; *Centralia & C. R. Co. v. Brake*, and note.

THOMSON

v.

SEBASTICOOK AND MOOSEHEAD R. Co.

(*Maine Supreme Judicial Court, December 10, 1888.*)

Eminent Domain—Damages—Obstructing Flow of Water.—In a proceeding for damages sustained by the location of a railroad upon the complainant's land, where the issue is whether lands are naturally wet, it is competent for the complainants to show that the obstruction of a free passage of the water from the lands is caused by the temporary filling up of a brook with rocks.

Same—Permanent Obstructions—Instructions.—An instruction to the jury excluding from their consideration all evidence of permanent obstructions to the flow of water from the land, and charging them that evidence of mere temporary obstructions carried there accidentally or otherwise would be proper proof for their consideration of the real nature of the land, is correct.

EXCEPTIONS from Supreme Judicial Court.

Appeal from the award of county commissioners for damages sustained by the complainant in the location of defendant's railroad over her land. At the trial the complainant claimed that

the land taken was valuable for building-lots, but the defendant claimed that it was unfit for that purpose, by reason of the water standing thereon during a portion of the year. The complainant thereupon offered to prove that the standing water was caused by obstructions in a drain passing under defendant's railroad, and by the location of another railroad. The court ruled that the complainant could not prove a permanent obstruction to the flow of the water there, but subsequently evidence covering the same point was admitted without objection. The court instructed the jury as follows: "It is said that the land itself is not wet or flowed naturally to any considerable depth; but what flowing is there, or mainly caused, is by virtue of some obstructions which were put in in past time. All permanent obstructions I excluded, for this simple reason: If this railroad was bound to pay for this land as good land, when it was made bad, unvaluable for the parties, by some other person,—for instance, the Maine Central R. not putting their culvert right,—then they could get pay for their land twice, because they would have a perfect remedy against the person who made the obstruction; and if they could have another remedy, it would give them double pay. But, whether their remedy is good or not, this corporation is not bound, directly or indirectly, to pay for any wrong done by any other person or any other corporation; but what would be a mere temporary obstruction, carried there accidentally or otherwise, would be proper to prove to a jury as to the real nature of the land," etc. Verdict in favor of the complainant, who alleged exceptions to the exclusion of the evidence and the preceding instructions to the jury.

Brown & Johnson and *S. S. Hackett* for complainant.

J. O. Bradbury and *Merrill & Coffin* for respondent.

PETERS, C.J.—If the rulings and instructions are correctly interpreted by the plaintiff's counsel, they were wrong. The question of the case is not very clearly presented. But with the burden of the plaintiff to show that he has been aggrieved, we are inclined to believe that his position is not sustained. The matters in controversy were more fully explained by the judge in the reported charge than the exceptions present to us. An issue of fact in the case was, whether the land taken by the defendant road was naturally wet land or not, the evidence showing that water stood upon it for quite a period during the year. The defendants contended that the wet condition of the land was its natural condition, or, what would be of the same effect as between the parties to this litigation, was caused by certain legitimate obstructions of a permanent character put on the plaintiff's land by another railroad, the Maine Central R., which prevent the free flowing of the

Question presented.

surface-water from her land. To counteract this position, the plaintiff contended that the obstruction to a free passage of the water from her land was caused, not by the Maine Central R. bed, but by a person filling up a brook with rocks, while clearing a parcel of land, at a point below that railroad, so that the brook would at times flow the water back through a culvert, under the railroad, upon her land. An objection was made to the evidence showing this contention, and the objection was sustained. It should not have been. The rocks in the brook were not a permanent obstruction, and the owner above could have gone below and rightfully removed them from this natural water-passage, in order to prevent the incubus of water upon her land. But this error in the ruling was afterwards obviated by the witness going on, at a later point in his examination, and explaining the matter fully, without encountering objection.

The judge, in his charge, properly made a distinction between permanent and temporary obstructions, taking the position, substantially, that any permanent injury to the land caused by the rightful use of it by the Maine Central road should be considered as an impairment of its value, which would lessen the damage otherwise to be paid by the defendants. Some of the confusion in the case was evidently owing to the counsel for the defendant objecting to the admission of evidence touching permanent obstructions, when he would have much better allowed its introduction, as the very argument that the value of the land taken must thereby be less. Though it may be doubtful whether the jury fully understood the points at issue between counsel in the case, there is a failure to show that the presiding judge committed any error, or that the exceptions should be sustained. Exceptions overruled.

WALTON, DANFORTH, VIRGIN, EMERY, and HASKELL, JJ., concurred.

Eminent Domain—Surface-waters—Obstructing Flow.—For a full discussion of the question of surface-waters, and the obstruction of the flow of the same, see *Philadelphia, W. & B. R. Co. v. Davis* (Md.), 34 Am. & Eng. Corp. Cas. 143, and note, and 6 Am. & Eng. Encyc. of L., tit. Eminent Domain, VIII, c. (2), p. 559.

Permanent ob-
struction—Im-
pairment of
value.

LEROY AND WESTERN R. CO.

v.

HAWK.

(Kansas Supreme Court, July 7, 1888.)

Eminent Domain—Compensation—Elements of Damages—Submission to Jury.—The jury may be interrogated as to any particular element of the damages suffered by reason of the construction of a railroad over a tract of land; but a refusal to submit a question asking the jury to state all the elements or sources of damages, and the amount allowed for each, is not error.

Same—Compensation—Evidence of Value—Opinion Evidence.—A farmer who resides in the vicinity of farming-land, who is acquainted with its situation and quality, its advantages and disadvantages, and who states that he knows its market value, is competent to give an opinion in regard to what the value is, although he may not have been engaged in buying or selling land, and although such opinion is not based on the prices paid upon actual sales of that or similar land.

ERROR to District Court of Sumner County.

The facts sufficiently appear in the opinion.

Geo. R. Peck, A. A. Hurd, and O. J. Wood for plaintiff in error.
Haughey & McBride for defendant in error.

JOHNSTON, J.—This action was brought to the district court of Sumner county on appeal by Rachel A. Hawk from the report of the commissioners appointed by the judge of the district court of that county to condemn a right of way for the Leroy & Western R. Co. through a portion of Sumner county, and across an 80-acre tract of land belonging to Rachel A. Hawk. The commissioners had reported that appellant would suffer damages, by reason of the construction of the road through her premises, in the sum of \$164; and at a trial, which was had with a jury on December 18, 1886, there was a verdict assessing the appellant's damages at \$700. A motion for a new trial was overruled, and judgment entered upon the verdict. The railway company has removed the cause to this court, and asks a reversal upon three grounds—(1) error in refusing to submit certain special questions; (2) in permitting incompetent witnesses to testify as to the value of the land; (3) in giving improper instructions to the jury.

The court refused to submit the question, "How much was

the damage to the farm by reason of the water in the ditch, thereby causing the adjacent land belonging to the plaintiff to cave in?" The question was not warranted by the testimony offered in the case, and its refusal was not erroneous. The court was further requested to submit to the jury the question, "What damage resulted to the farm by reason of the scaring of stock by the company's cars?" But this was properly denied, as the jury were charged that they had no right to take into consideration, in their estimate of damages, any risks which the appellant might incur in the way of scaring her stock and teams, as such damages were speculative only. The third question refused, and about which complaint is made, was: "What are the several elements or sources of the damages which make up the aggregate to the answer to special question No. 10? and how much of said aggregate is made up by each of said elements or sources of damage?" Finding No. 10, referred to, is: "How much damage to the land by reason of the inconvenience for farming and using and occupying such land was caused by the building of said railway through, over, and across said land? Answer. \$380." This method of questioning a jury would serve no good purpose, and is not permissible. A party desiring special findings should submit particular questions instead of general ones, and should not leave the jury to analyze and separately state the constituent elements of the damage suffered. The jury may be interrogated as to any particular element about which there was testimony offered; but to require them to distinguish and describe all the sources of damage, and the amount allowed for each, would probably result in confusion, delay, and uncertainty. Such a procedure is not within the purpose of the statute, and has already been disapproved of by this court. *Railway Co. v. Paul*, 28 Kan. 816; *Foster v. Turner*, 31 Kan. 58.

The next objection is that the opinions of incompetent witnesses, as to the market value of the land, were received. These witnesses were farmers living in the neighborhood of the land in question, well acquainted with its situation and fertility, its advantages and disadvantages, and they were therefore qualified to state their opinions in regard to its value before, and after, the railroad was constructed through it. This is not a question of science or skill, requiring expert testimony, but it falls within one of the exceptions to the rule excluding mere opinions of ordinary witnesses. It is not necessary that the witnesses shall be engaged in buying and selling land, nor that they should have knowledge of an actual sale of that or similar land, to make them competent. A farmer living in the vicinity is presumed to be familiar with and to know the value of farm lands; and there can be no doubt

Elements of
damage—Sub-
mission of
question to
jury.

Opinion evi-
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value.

of his competency when it is shown that he knows the situation and character of the land, its productiveness and availability for use, and who further states that he knows the value of the same, as did the witnesses in the present case. *Railway Co. v. Allen*, 24 Kan. 33; *Robertson v. Knapp*, 35 N. Y. 91; *Railroad Co. v. Henry*, 79 Ill. 290; *Railroad Co. v. Bunnell*, 81 Pa. St. 425; *Railroad Co. v. Pearson*, 35 Cal. 247; *Railway Co. v. Warren*, 12 Pac. Rep. 641; 3 *Suth. Dam.* 463; *Lawson Exp. Ev.* 435.

The final objection made to a portion of the charge given to the jury is not available. No exception to the instruction was taken at the trial, nor does the record disclose that there was an exception, either general or special, to any portion of the charge; and hence its correctness is not now open to inquiry. We find no error in the record, and therefore will affirm the judgment of the district court.

All the justices concurring.

Eminent Domain—Elements of Damage.—As to the elements of damage to private property taken under an exercise of the power of eminent domain, see, *ante*, *Dowd v. Mason City & F. D. R. Co.*, 633, and note, 637.

Upon an issue of the damages to land taken by a railway company, questions as to whether the land taken, by reason of its poverty, was not left vacant after the surrounding lands had been pre-empted, and if it was not reputed to be the poorest land in the neighborhood, were asked upon cross-examination of a witness for the owner. *Held*, that the exclusion of such testimony, if error, was cured by the subsequent testimony of the witness that the land was not in fact the poorest; also that the jury may, in such case, be interrogated as to any particular element of the damages suffered by reason of the construction of the road over the land; but a refusal to submit questions asking the jury to state all the elements of damage, and the amount allowed for each, is not error. *Leroy v. Hollis*, (Kan.), 18 Pac. Rep. 947, following *Railway Co. v. Hawk*, *ante*, 943, and *Railway Co. v. Crum*, *ante*, 944.

The supreme court of Iowa held, in the case of *Cox v. Mason City & F. D. R. Co.*, 41 N. W. Rep. 475, that where a railroad is located across a block of land in a town site, which has been platted into lots, the measure of damages to the owner of the block is the difference in the value of the whole block before, and after, the location, and not merely the difference in the value of the lots over which the road actually passes.

For a full discussion of the question of diminution in value of property not taken, see, *ante*, *Chicago, K. & N. R. Co. v. Wiebe*, 642, and note, 647.

GALVESTON WHARF CO.

v.

GULF, COLORADO AND SANTE FÉ R. CO.

(*Texas Supreme Court, January 18, 1889.*)

Eminent Domain—Pleading—Exception.—In an action against a railroad company for use and occupation of lands, an answer in reconvention or justification was filed, describing the property, alleging that it was necessary to the company's use that it had tendered the plaintiff the value thereof, and praying that the same be condemned, is subject to exception as not the proper proceeding for the appropriation of lands.

Same—Trespass—Use.—Where one by mistake occupies the land of another without his consent, the law will not imply a contract to pay the owner such sum for the use as he has notified the trespasser he will be charged therefor during the time he occupies the same.

Same—Measure of Damages.—In such a case the proper measure of damages is what the owner could have leased the premises for if the defendant had not inadvertently occupied it.

APPEAL from District Court of Galveston County.

Action by the Galveston Wharf Co. against the Gulf, Colorado & Santa Fé R. Co., for use and occupation. From the judgment of the district court, plaintiff appeals. Facts set forth in the opinion.

Wheeler & Rhodes and C. L. Cleveland for appellant.

Gresham, Jones & Spencer for appellee.

GAINES, J.—The Gulf, Colorado & Santa Fé R. Co. having laid its track across the corner of a lot, in the city of Galveston, belonging to the Galveston Wharf Co., and erected certain buildings thereon, the latter brought suit against the former to recover for the use and occupation of the property, alleging a contract to pay \$100 per month rent. The defendant company pleaded a general denial; and also pleaded in reconvention that the property (describing it) was necessary to its uses, and that it had tendered the plaintiff the value thereof (stating the sum), and prayed that the property be condemned. The plaintiff recovered for the use of the property a less sum than it claimed, and there was also a judgment for the defendant condemning the property to its use, and awarding to the plaintiff the value thereof as found by the jury. The plaintiff appeals.

Facts.

The first question presented is as to the power of the court to enter a judgment of condemnation in this proceeding. In *Railway Co. v. Benitos*, 59 Tex. 326, it is said that "It is held by the great weight of authority that, when a statute provides a tribunal and mode of procedure by which property may be condemned to a public use, such tribunal has exclusive jurisdiction, and that the person or corporation to whom the statute gives the right to institute a proceeding to condemn land cannot resort to any other." Following this doctrine, it was decided by the commission of appeals, in an opinion adopted by this court, that property could not be condemned for public use in the district court in a suit of this character. *Railway Co. v. Poindexter*, 70 Tex. 98. As authority for holding that the court below erred in not sustaining the exceptions to so much of defendant's answer as sought to condemn the land, the case cited is precisely in point. The appellant company there had been sued in the court below by the owners of a certain tract of land covered by its line of road, to recover the land upon which the roadbed was constructed and the right of way claimed. The company, in its answer, prayed that, in the event that the plaintiffs should be held entitled to recover, the right of way should be condemned in that suit, and its value assessed; and it had judgment accordingly. This was held error, and that the district court had no jurisdiction to hear and determine the plea for the condemnation of the land. The only distinction between the two cases, so far as the point under consideration is concerned, is that in the former case the condemnation of an easement only was sought, while in this the defendant asked the condemnation of the fee. But the statute provides the same mode of procedure for condemning the fee as for condemning the right of way, and therefore the principle applicable to the two cases is the same. Rev. St. arts. 4180, 4194, 4206. The exceptions to defendant's special answer should have been sustained, but it is due to the learned judge who tried the case below to say that at the time of the trial the opinion in *Railway Co. v. Poindexter*, above cited, had not been delivered. The other assignments of error which relate to this branch of the case need not be considered.

In reference to the rents, the evidence showed that the defendant company appropriated plaintiff's land by mistake. In 1883 the wharf company discovered that the railroad company was in possession of its land, and thereupon the secretary of the wharf company wrote to the president of the railroad company, demanding rent at the rate of \$100 per month, and presenting a bill, but received no reply. He wrote again a short time afterwards, notifying the

Jurisdiction
of district
court—Plead-
ing—Excep-
tion.

Trespass—
Contract to
pay for use.

railroad company that, if it continued to occupy the premises, it would be charged \$100 per month. In 1886 the general manager, to whom a bill for rent at \$100 per month had been presented, wrote, declining to pay it, because it was exorbitant. The secretary of the plaintiff company presented defendant company a bill for \$100 rent at the end of every month, but none of them were paid. The plaintiff asked the court to give a charge which embraced this instruction: "And you are further charged that, if you find from the evidence that the defendant used and occupied the plaintiff's property for the period claimed, and that there was no express understanding as to rent or compensation, but that the plaintiff charged rent therefor at the rate of \$100 per month, and rendered and delivered monthly bills for such charge of \$100 per month, monthly to defendant, and that defendant received these bills monthly, and made no objection thereto, and continued to use and occupy said property after such notice of said charge, then you are charged that, under these circumstances, the law implies a contract on the part of defendant to pay such sum, and your verdict should be for plaintiff for such sum per month for the number of months that it has been shown by the evidence the defendant occupied said premises after such notice." The court refused this charge, and its refusal is assigned as error. We think the court did not err in refusing the instruction. A contract necessarily requires the consent of both parties, except in a small group of cases where the law implies the consent of the party sought to be charged; but the occupation of land without the consent of the owner is not one of this class. See Bish. Cont. c. 8. The rule is not changed where the owner notifies the trespasser that unless he gives up the possession, he will be charged rent at a certain rate. To so hold would be to decide that the owner of the land, by giving notice to the trespasser that he must pay rent or abandon the premises, could change the relation of the parties, and of his own motion make them landlord and tenant. Not only this, but, by fixing the amount of rent to be paid, he could recover in his action a sum not agreed upon by the occupant, but arbitrarily fixed by himself. In cases of this character, in order to recover rent, technically as such, there must be an agreement to pay the rent, to which the minds of both parties have assented. In the absence of direct proof of an express agreement, an agreement may be established by circumstances; but they must be such as to evidence the belief that it was consented to by the parties to it. Such being the law in reference to the assignment under consideration, it is sufficient to say that the charge given by the court went as far as the plaintiff had the right to demand, and no further instruction was necessary.

It is also assigned that the court erred in refusing to grant a new trial on the ground that the evidence did not warrant a verdict for the sum awarded by the jury. Damages—
Measure of. Upon the question of the value of the use and occupation of the premises, the evidence was conflicting. One witness swore that the value was \$100 per month for railroad purposes. Another put it as low as \$20, but did not know what it was worth for railroad purposes. We fail to see any reason why it was worth more because a railroad might desire to use it than if an individual wanted it. It does not appear that any railroad company other than the defendant could have made use of the property. It seems to us the proper measure of plaintiff's damages was what the plaintiff could have leased it for if the defendant had not inadvertently occupied it, and that, if the jury believed the witness who last testified as to the value, they gave an ample compensation. We cannot say that the damages are manifestly too small; and therefore the verdict should stand.

The judgment will be reversed, and here rendered for the plaintiff below for the amount found by the jury as damages for the use and occupation of the premises, and also for the plaintiff against the defendant on its plea in reconvention. The appellee will pay all costs in this court and the court below.

Eminent Domain—Measure of Damages.—As to, see, *ante*, *Wabash St. L. & P. R. Co. v. McDougal*, and note; *Doud v. Mason City & F. D. R. Co.*

LE ROY AND WESTERN R. CO.

v.

BUTTS.

(*Kansas Supreme Court, November 10, 1888.*)

Eminent Domain—Compensation—Evidence—Declaration of Owner.—In an action by plaintiff to recover damages for the appropriation of a right of way through his farm by defendant, the declarations of plaintiff, made at the time of the appropriation, are competent, and can be offered as original evidence, without calling plaintiff's attention to the same.

Same—Growing Crop—Market Value.—Where wheat in the milk, growing in a field, is taken, evidence of the market value of wheat in the nearest market, with the usual cost of harvesting and marketing it, is competent evidence tending to show the value of the growing crop.

COMMISSIONERS' decision. Error to District Court, Sumner County. HERRICK, Judge.

Action by S. J. Butts to recover damages against the Le Roy

& Western R. Co. for a right of way. Defendant brings error to a judgment for the plaintiff.

Geo. R. Peck, A. A. Hurd, and O. J. Wood for plaintiff in error.
McDonald & Parker for defendant in error.

HOLT, C.—Upon an appeal from condemnation proceedings the plaintiff below filed his petition in the district court

Facts.

of Sumner county, alleging therein that he was the owner of a certain farm in that county, containing about 404.24 acres; that through it the railroad company condemned its right of way, taking a strip 100 feet wide, and containing about 9 1/4 acres; that it was of the value of \$50 per acre; and that the construction of the road through the farm lessened its value for farm purposes to the amount of \$3234, in addition to the value of the land actually taken. Trial was had in December, 1886, and a jury returned a verdict in favor of the plaintiff for \$2796.85. The defendant brings the case here for review. The errors complained of which we shall notice, arose upon the rulings of the court on the introduction or rejection of testimony. The plaintiff, to support his action, testified that the value of the entire tract was \$50 an acre before, and \$41 immediately after, the right of way was taken by the railroad company. Other witnesses testified to nearly the same values. The defendant,

**Damages—
Declarations
of owner.**

in introducing its evidence, asked each of the commissioners appointed by the judge of the district court what the plaintiff told them, at the time of the condemnation, the land was worth per acre. The court refused to allow them to answer. In this the court erred. The plaintiff claims this was impeaching evidence, and as the defendant, while on the witness-stand, had not been interrogated concerning his statements to either of the commissioners, therefore it was not admissible; but this evidence was admissible for another ground than that of impeachment. It was the admission of a party to the suit, and was original evidence. The value of this land at the time it was appropriated was a legitimate subject of investigation, and a natural and important element in establishing plaintiff's claim. The damages of plaintiff were proven very largely by the evidence of the plaintiff and his witnesses, by their opinion of what the farm was worth per acre immediately before and immediately after the appropriation of the right of way. This statement of what the plaintiff said his farm was worth per acre at that time is material evidence, and loses none of its force as an admission because it was his opinion. For this error the judgment must be reversed. Another objection made by the defendant is that the witnesses for the plaintiff who testified to the value of the land were not qualified to give such testimony. This question has been recently

before this court, and decided. *Railroad Co. v. Hawk*, 39 Kan. 638. At the time of the appropriation, there were two and a half acres of wheat in the milk upon the land actually taken by the railroad company on its right of way. Its value was established by proving the value of wheat in the nearest market, and the testimony of witness showing what it would probably cost to harvest, thresh, and carry it there, if it should ripen. We perceive no material error in this method of proof. To be sure, the wheat was not ripe, and might have been subject to some loss and injury by storm, insect, or otherwise. It might have had no market value growing in the field, and its value could have been ascertained more accurately and satisfactorily by the value of wheat usually sold in the market than by any other proof. We recommend that this case be reversed, and cause remanded for new trial.

PER CURIAM.—It is so ordered ; all the justices concurring.

Eminent Domain—Declarations of Owner—Admission in Evidence.—See *Central Branch U. P. R. Co. v. Andrews*, 33 Am. & Eng. R. R. Cas. 205 ; *Central Branch U. P. R. Co. v. Andrews*, 30 Ib. 352, note 355.

NORTHEASTERN NEBRASKA R. CO.

v.

FRAZIER.

(*Nebraska Supreme Court*, November 28, 1888.)

Eminent Domain—Damages—Witness—Competency.—In an action to recover damage for real estate condemned for right of way for a railway company, a witness who testifies that he resides near the land condemned, and was acquainted with the value of real estate in that vicinity at the time of the condemnation, is, *prima facie*, a competent witness to prove the amount of damages sustained by the landowner.

Same—Petition—Date of Filing—Evidence—Admissibility.—While the date of filing a petition to condemn real estate for right of way of a railroad is deemed the time when the appropriation takes place for the purpose of assessing damages, yet proof is not limited to that particular day ; and where the petition was filed in June, and a witness testified to the value in the following August, the evidence was held admissible.

ERROR to District Court, Wayne County.

Action by Randall Frazier to recover damages for land condemned for right of way for the Northeastern Nebraska R. Co. Judgment in favor of plaintiff, and defendant brings error.

H. C. Brome for plaintiff in error.

James Britton and *H. H. Moses* for defendant in error.

86 A. & E. R. R. Cas.—43

MAXWELL, J.—The questions involved in this case are, to a great extent, the same as in *Railroad Company v. Frazier*, just decided. The first point decided in that case does not arise in this; but the decision of the other questions in that case will be adhered to in this. The new points raised in this case are:

1. The incompetency of a certain witness to testify to the value of the lands injured. The testimony of one Steel is referred to, to show his incompetency. In regard to his qualifications, he testifies as follows: "Question. Where do you reside? Answer. Wayne, Nebraska. Q. Are you acquainted

with Randall Frazier, the plaintiff in this case? A. Yes, sir. Q. Are you acquainted with the location of the northwest quarter of section 14, Tp. 26, R. 3 E.?

A. Yes, sir. Q. Are you acquainted with the S. E. quarter of Sec. 23, Tp. 26, R. 3 E., and the location thereof? A. Yes, sir. Q. And the S. $\frac{1}{4}$ S. E. $\frac{1}{4}$ Sec. 14, Tp. 26, R. 3 E.?

A. Yes, sir. Q. Are you acquainted with the location of the S. W. $\frac{1}{4}$ Sec. 13, Tp. 26, R. 3 E.?

A. Yes, sir. Q. State, if you know, where these lands are located, relative to this town?

A. They join the town site. Q. On which side? A. Southwest side. Q. State, if you know, who is in the occupancy of these lands; and who has been, for the last four or five years.

Objected to by the defendant as immaterial; overruled by the court, to which the defendant excepts. A. Randall Frazier.

Q. Were you, in the year and in the summer of 1886, acquainted with the market value of these lands, and also the lands in their immediate vicinity? A. I was." He was then permitted to testify as to the value of the land before the location of the road, and the value immediately afterwards. In this, we think, there was no error. *Prima facie*, at least, he had shown sufficient to make his testimony admissible. He testifies to his residence near the land, to the knowledge of its value at the time the railway was located across the land. If the railway company desired a more complete statement, it should have cross-examined the witness upon that point. The fact that it failed to make an extended cross-examination upon that point leads to the inference that such cross-examination would have shown the witness to be thoroughly qualified. This ground of objection, therefore, is unavailing.

2. The second ground of error is that the court erred in receiving evidence of the value of this land in August, 1886. It is true the petition was filed June 11th of that year, and the appraisalment made on the 23d of that month. The

time of filing the petition is to be taken as the period when the damages are to be determined. This, however, we do not understand to be limited to any particular day. The estimate is to be made at about that time. If

Damages—
Incompetency of witness.

Evidence as to value—Date of filing petition.

there is a fluctuation in value, it may be shown; but testimony as to the value a short time after the appropriation is admissible; and in the absence of any proof showing an increase or diminution in value after the appropriation, a jury would be warranted in finding that the same values had existed at the time of the appropriation. Ordinarily, in one or two months there will be but little fluctuation in the value of real estate. The location of a new line of railway may, and in most cases does, advance the general values of land along the line of such railway—particularly near stations. But such advance usually seems to take place upon the location of the line, and before the construction of the road, so that it may be said that the enhanced general values are discounted. If, however, there should be such fluctuation, it may be shown. In any event, the testimony was competent, although the court may require further proof of the relative values at the time of the appropriation. The judgment is clearly right, and is affirmed. The other judges concur.

Eminent Domain—Opinion Evidence as to Value of Land.—See next case, *Sigafoos v. Minneapolis, etc., R. Co.*, and note, 677; *ante*, *Le Roy & W. R. Co. v. Ross*, 665; see also *Wichita & W. R. Co. v. Kuhn*, 33 Am. & Eng. R. R. Cas. 159, note, 161.

SIGAFOOS

v.

MINNEAPOLIS, LYNDAL AND MINNETONKA R. CO.

(*Minnesota Supreme Court, June 18, 1888.*)

Eminent Domain—Compensation—Damages—Opinion Evidence.—In condemnation proceedings for taking for a railroad a strip through a farm, it is proper to ask the witnesses what is the difference between the value of the farm without the railroad across it, and its value with the railroad across it.

Same—Witnesses—Cross-Examination.—When the company's witnesses had stated their opinion of such difference in values, it was proper, on cross-examination, in order to test the value of their opinions, to ask them if in their judgments it would make any difference that the owner had no right to cross the right of way taken.

Same—Measure of Damages—Reservation of Crossings—Instructions.—Certain crossings made by the company, at the owner's request, in constructing the road, being apparently only temporary, it was right in the court to decline to charge that the amount of the verdict should be the dif-

ference in the values without the railroad, and with the railroad "with the crossings over and under the track now there."

APPEAL from District Court, Carver County.

Condemnation proceedings instituted by the appellant, the Minneapolis, Lyndale & Minnetonka R. Co., for right of way across the land of William X. Sigafos.

M. D. Grover and *G. M. Nelson* for appellant.

Peck & Brown for respondent.

GILFILLAN, C.J.—This is an appeal by the company from an order refusing its motion for a new trial in proceedings to condemn land for the use of its railroad. The land sought to be condemned was a strip, for the company's right of way, running through plaintiff's farm, cutting it into two parts. The first assignment of errors is upon several questions asked witnesses by plaintiff and objected to by the appellant; in substance this: "What was the difference between the value of the farm without

Damages—
Opinion evi-
dence.

the railroad across it, and its value with the railroad across it?" An objection is made here that the witnesses were not shown competent to answer, but that objection was not made below, and of course cannot

be raised here. Otherwise the questions were proper. To assist the jury in arriving at the damages, the opinions of witnesses as to the value, though not conclusive, are always proper; and in that manner may be proved the value of the entire tract before the taking, and the value with the strip taken out for railroad purposes. *Simmons v. Railway Co.*, 18 Minn. 184 (Gil. 168); *Grannis v. Railway Co.*, 18 Minn. 194 (Gil. 178). The second assignment of errors is upon questions asked by plaintiff of appellant's witnesses on cross-examination. They had testi-

Same—Wit-
nesses—Cross-
examination.

fied as to the difference in value of the farm made by taking the strip out for a railroad, and on cross-examination they were asked if it would make any difference in their judgment that the owner had no right to cross the right of way. As the statute (chapter 174, Laws 1887) gives the owner in such case the right to a crossing constructed at his own expense, when he requires it, by notice served on the company in the manner it prescribes, of course the damages cannot be assessed on the theory that the land is taken, leaving the owner no right to cross. But it is apparent that ordinarily some inconvenience in the use of a farm thus cut in two would arise from the owner's right of passage from one part to the other being limited to a particular point. And after appellant's witnesses had given their opinions as to the difference in value caused by the railroad running through the farm, it was proper for the plaintiff, on cross-examination, to test the value of

those opinions by asking the witnesses whether, and to what extent, in their opinion, the inconvenience of passing from one part of the farm to the other would affect the value. The question asked did not go beyond this legitimate purpose, for if, in answer, they had stated that in their opinions it did not make any difference that the owner had no right to cross from one part to the other of his farm, it must be apparent that their opinions as to the difference made in the value by running the railroad across it would be entitled to comparatively little weight. The court, in its charge, explicitly instructed the jury in substance that the plaintiff had a right to crossings, and that he could by law enforce such right if the company refused to allow it. Two requests of appellant were given, with a modification, and the modification is assigned as error. The two requests were in substance alike, so that we need state but one, as follows: "The amount of your verdict must be the difference in the market value of this appellant's farm without the respondent's railroad upon it, and with its railroad upon it as it now is, *with the crossings over and under the track now there.*" The court refused to give the part of the request we have italicized, but gave the remainder. There was some evidence in the case of two crossings made by the company at plaintiff's request, when constructing the road. From the evidence they were apparently temporary. As they were not procured by plaintiff in the manner pointed out in the statute, it would have been difficult for the jury to find (what the requests assumed) that they were intended to be permanent, and to fix the rights of the parties in that respect. For that reason the requests were properly modified.

Measure of
damages—
Reservation of
crossing.

We see nothing in the case to suggest that the evidence is not sufficient to sustain the verdict, or that the damages are excessive. Order affirmed.

Eminent Domain—Measure of Damages.—As to the measure of damages in cases of appropriation of private property under an exercise of the power of eminent domain, see, *ante*, Wabash, L. & M. R. Co. v. McDougal, 594, and note, 604-606; Doud v. Mason City & F. D. R. Co. and note, 633-637; Galveston Wharf Co. v. Gulf, C. & S. F. R. Co. 668, and note, 671.

Same—Opinion Evidence.—For a full discussion of the admissibility and value of opinion evidence, see 7 Am. & Eng. Encyc. of L., tit. "Expert and Opinion Evidence," pp. 490, 516.

It is said by the supreme court of Nebraska in the case of Blakely v. Chicago, K. & N. R. Co., 40 N. W. Rep. 956, that where persons are shown to be familiar with the value of a particular piece of land across which a railroad has been built, they may be permitted as witnesses to testify as to the value of such tract immediately before the location of the road, and to the value thereof immediately afterwards, and by the supreme court of Kansas, in the case of Kansas City & S. W. R. Co. v. Ehret, 20 Pac. Rep. 538, that farmers who reside within the vicinity of a particular farm, who are familiarly acquainted with the farm, who know its capabilities, and who

can testify that they know its value, may give their opinions in evidence with respect to its value; and such opinions are competent evidence, although such farmers may not know of any sale of any farm in that vicinity. The court say "that, after a careful consideration of this case and of the whole subject of the proof of value of real estate, we have come to the conclusion, both upon reason and authority, that farmers who reside within the vicinity of a particular farm, who are familiarly acquainted with the farm, who know its capabilities, and who can testify that they know its value, may give their opinions in evidence with respect to its value; and such opinions are competent evidence, although such farmers may not know of any sale of any farm in that vicinity. As tending to support these views we would refer to the following authorities: *Railway Co. v. Chapman*, 38 Kan. 307; 16 Pac. Rep. 695; *Railway Co. v. Hawk*, 39 Kan. 638; 18 Pac. Rep. 943; *Railroad Co. v. Ross*, 40 Kan. —; *Whitman v. Railroad Co.*, 7 Allen, 318; *Snow v. Railroad Co.*, 65 Me. 230; *Railroad Co. v. Von Horn*, 18 Ill. 257; *Railroad Co. v. Henry*, 79 Ill. 290; *Johnson v. Railway Co.*, 111 Ill. 413; 25 Am. & Eng. R. R. Cas. 192; *Robertson v. Knapp*, 35 N. Y. 91; *Snyder v. Railroad Co.*, 25 Wis. 60; *Railroad Co. v. Schluntz*, 14 Neb. 421; *Railroad Co. v. Weimer*, 16 Neb. 272; *Sherman v. Railway Co.*, 30 Minn. 227; 10 Am. & Eng. R. R. Cas. 193; *Railroad Co. v. Mims*, 71 Ga. 240; *Railroad Co. v. Anderson*, 39 Ark. 167, 172; *Railroad Co. v. Bunnell*, 81 Pa. St. 414, 426; *Railroad Co. v. Woodruff*, 5 S. W. Rep. 792. See also *Lawson Exp. Ev.* 433-438, and cases there cited; 1 Suth. Dam. 799; 3 Suth. Dam. 462.

"In the case of *Railway Co. v. Chapman*, 38 Kan. 307, we held that persons residing in the vicinity of the land, but without any knowledge of the market value thereof, may in some cases give their opinions as to its value. The syllabus of that case reads as follows: '(1) Upon the trial of an appeal from an award, by commissioners, of damages caused by the appropriation of a right of way through an addition to a city, for railroad purposes, and a number of witnesses are called who testify that they have known the land appropriated for many years, its location and situation, and that at the time of its appropriation it had no market value; that they knew the value of real estate in that vicinity at the time of said condemnation; and such witnesses are permitted, over the objection of the defendant, to testify as to the value of the lots appropriated,—held, not error. (2) Where it is shown that the property sought to be appropriated has no market value at the time of its appropriation, witnesses who are competent to testify to the value of property may give their opinions of the value of the land so taken.' See also *Railway Co. v. Hawk*, 39 Kan. 641, where it is said as follows: 'The next objection is that the opinions of incompetent witnesses as to the market value of the land were received. These witnesses were farmers living in the neighborhood of the land in question, well acquainted with its situation and fertility, its advantages and disadvantages, and they were therefore qualified to state their opinions in regard to its value before and after the railroad was constructed through it. This is not a question of science or skill, requiring expert testimony, but it falls within one of the exceptions to the rule excluding mere opinions of ordinary witnesses. It is not necessary that the witnesses shall be engaged in buying and selling land, nor that they should have knowledge of an actual sale of that or similar land, to make them competent. A farmer living in the vicinity is presumed to be familiar with and to know the value of farm lands, and there can be no doubt of his competency when it is shown that he knows the situation and character of the land, its productiveness and availability for use, and who further states that he knows the value of the same, as did the witnesses in the present case.'"

OWSLEY

v.

OREGON RAILWAY AND NAVIGATION CO.

(Washington Territory Supreme Court, Jan. 29, 1889.)

Eminent Domain—Condemnation Proceedings—Costs.—Where, in pursuance of secs. 2473–2477 of the Code of Washington territory, three disinterested householders duly appraise the damages done to petitioner by reason of entry upon his lands by a railway company, and the location and construction of its line of road, without taking the proceedings required by statute therefor, and where, at the election of the company, the court ordered pleadings to be filed by the parties and issue made for a proper determination of the rights of the parties, and a trial was had in the district court, which resulted in the finding of the verdict for the petitioner in a sum less than that awarded by the householders, the company having made no offer to pay the petitioner either the amount of the verdict or any sum whatever, is not entitled, in pursuance of section 2475, to have the cost of the suit taxed against the owner.

APPEAL from First District Court.

The facts are sufficiently set out in the opinion.

Anders, Brento & Clark for appellant.

Allen, Gose & Crowley for appellees.

NASH, J.—During the summer and fall of 1885, the appellee, the Oregon Railway & Navigation Co., a foreign corporation, entered upon the lands of appellant, located and constructed part of its line of railroad between Star-Facts. buck and Pomeroy, and, without taking the required statutory proceedings therefor, or making or offering any compensation, actually appropriated to its own use a strip 50 feet wide on each side of its track. Some time thereafter Thornton W. Owsley, plaintiff below and appellant here, presented to a justice of the county his petition for compensation for the land thus taken and appropriated under section 2473 of the Code, entitled "Mode of proceeding to appropriate lands by private corporations." In pursuance thereof, the justice appointed and swore three disinterested householders, who appraised his damages at \$1425, which were duly reported to the district court, and the cause placed on the calendar of the next term. The Oregon Railway & Navigation Co., one of the parties herein, appeared, objected to the confirmation of the report, and signified its election to have the case tried. The court ordered pleadings to be filed by the parties as in ordinary civil actions,

and issue made for a proper determination of the rights of the parties, as provided in section 2475 of the Code, which was accordingly done. Upon the trial upon the issue thus joined the jury found a verdict for said plaintiff, Owsley, in the sum of \$1000, and thereupon judgment was rendered for that amount. Owing to some irregularity during the proceedings of said trial, exception was taken, and a new trial asked and refused. An appeal was taken to this court, and a new trial ordered, and the case remanded. 13 Pac. Rep. 186, 710. The trial anew in the court below resulted in a verdict by the jury for \$1000, the same as before. Thereupon, and before judgment, the defendant, the Oregon Railway & Navigation Co., moved the court for judgment for costs and disbursements, amounting to \$306.63, and for a judgment and decree of appropriation upon the payment of \$1000. After argument, the motion was overruled and denied, so far as the same asked for disbursements, and it was ordered that defendant have judgment for costs to the extent of \$15, the statutory attorney's fee, and for no other amount. Defendant excepted to this ruling and order, and exception was allowed. Judgment was thereupon entered in favor of plaintiff for \$1000, and a decree appropriating the strip of land sought to be condemned as a right of way upon the payment of said \$1000, and defendant was allowed judgment for \$15 costs. On March 31, 1887, after the entry of said judgment, defendant and plaintiff each filed a duly verified bill of costs and disbursements, and afterwards each party filed a motion to strike out the cost-bill of the other. The court allowed the motion to strike out, and disallowed the cost-bill of plaintiff, to which ruling plaintiff excepted. The court also allowed the motion, and struck out and disallowed the cost-bill of defendant, except as to the \$15 statutory fees, to which ruling and order defendant excepted, and the exception was allowed. Each party appeals.

The contention in this case involves the construction of chapter 188, entitled "Mode of proceeding to appropriate lands by private corporations," commencing with section 2473, and ending with section 2477; and more especially the question of costs to the prevailing party, as contained in section 2475 of said act. The defendant in the court below contends that, inasmuch as the defendant succeeded in reducing the damages awarded by the householders, as it sought to do by the trial in the district court, it is entitled to costs, in pursuance of the following provisions of section 2475, viz.: "And the issues thus formed shall be tried as in other civil cases, the costs to be taxed against the corporation only when the verdict and judgment is for a larger amount than was awarded by the householders, or the cause has been tried at the instance of such corporation, for the purpose of reducing the

Contentions of
the parties.

amount of damages, and the damages are not so reduced otherwise the costs shall be taxed against the owner of the land." It is further claimed by the defendant that the word "costs" in this section is used in its broad and popular signification, as more generally employed in the code, including all expenses, disbursements, etc., allowed to the prevailing party in all ordinary suits in our courts. The plaintiff also admits this view to be the better one, and acquiesces in such construction. The court fully concur in this view of it, and so far all are happily agreed.

It was evidently the object, of the legislature, in said act to provide a cheap, easy, and convenient mode of redress for all who might suffer by the accomplishment of a great public object, and for the taking and destruction of the property of another. Judge Cooley, in his work on Constitutional Limitations, p. 362, says: "Where, however, the property is not taken by the state or by a municipality, but by a private corporation which, though for this purpose to be regarded as a public agent, appropriates it for the benefit and profit of its members, and which may or may not be sufficiently responsible to make secure and certain the payment, in all cases, of the compensation which shall be assessed, it is certainly proper, and it has sometimes been questioned whether it was not absolutely essential, that payment be actually made before the owner could be divested of his freehold. Chancellor Kent has expressed the opinion that compensation and appropriation should be concurrent. 'The settled and fundamental doctrine is that government has no right to take private property for public purposes without giving just compensation; and it seems to be necessarily implied that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception concurrently, in point of time, with the actual exercise of the right of eminent domain.' And while this is not an inflexible rule, unless in terms established by the constitution, it is so just and reasonable that statutory provisions for taking private property very generally make payment precede or accompany the appropriation, and by several of the state constitutions this is expressly required. And on general principles it is essential that an adequate fund be provided from which the owner of the property can certainly obtain compensation. It is not competent to deprive him of his property, and turn him over to an action at law, against a corporation which may or may not prove responsible, and to a judgment of uncertain efficacy; for the consequence would be, in some cases, that the party might lose his estate without redress, in violation of the inflexible maxim upon which the right is based. What the tribunal shall

Compensation
as prerequisite
to appropriation.

be which is to assess the compensation must be determined either by the constitution or by the statute which provides for the appropriation. The case is not one where, as a matter of right, the party is entitled to a trial by jury, unless the constitution has provided that tribunal for the purpose. Nevertheless, the proceeding is judicial in its character, and the party in interest is entitled to have an impartial tribunal, and the usual rights and privileges which attend judicial investigations." And further on, the same learned author says: "An inflexible rule should govern them all, that the interest and exclusive right of the owner is to be regarded and protected so far as may be consistent with a recognition of the public necessity. While the owner is not to be dispossessed until compensation is provided, neither, on the other hand, when the public authorities have taken such steps as finally to settle upon the appropriation, ought he to be left in a state of uncertainty, and compelled to wait for compensation until some future time when they may see fit to use his land. The land should either be his, or he should be paid for it."

So far as we are informed, no effort or offer was made by the defendant to compensate this man at any time for taking his property; no offer was made to compensate him before the initiatory step of appointing the three householders was taken; and, after they had found he was damaged in the sum of \$1425, no offer was made to tender him this or any other sum in satisfaction of the amount that he may have been injured. When the parties appeared in the district court, no offer was made to pay him any sum whatever for the injury sustained. After trial was had in the first instance, and the jury had rendered a verdict in his favor for \$1000, no offer was then made to pay him \$1000 or any other sum. And after appeal taken to the supreme court, new trial granted, remanded for new trial to the district court, no offer was then made on the part of the defendant to pay him \$1000 or any other sum whatever. And now, at the end of this litigation, it is proposed to tax the costs up to him, which will very much indeed decrease the amount of compensation actually due him for the property taken; and it can be readily seen that cases might arise under this statute where the party might lose his entire estate, and be mulcted in damages besides, if the view taken by the appellee in regard to costs should prevail. The act in controversy is very inartificially drawn, and defective in many particulars, and is now fortunately repealed. This statutory remedy, however, was exclusive of all other remedies, and appellant Owsley pursued it honestly and earnestly, as affording him the only means to recover damages for taking his property; and we think it would be grossly unjust, in view of the circum-

stances surrounding the case, to adjudge him to pay the costs. All proceedings up to the time when the parties appeared in the district court were to be regarded as of a more amicable than legal character, and for the purpose of bringing about some amicable and complete adjustment without the necessity of prolonged litigation, and, failing in this, to bring the parties into court, where all their differences could be definitely, properly, and legally determined. And certain it is that the parties did appear, in pursuance of this act or otherwise, in the district court of Garfield county, there acquiesced or submitted to its jurisdiction by filing proper pleadings touching the matter in controversy, and then and there had a trial according to the course of legal procedure in ordinary actions before a jury, and their controversy fully and legally settled; that the said suit was like any other suit in court, and that the plaintiff then and there recovered \$1000 for his damages; and that he was entitled to his costs in this behalf expended, like any other ordinary suitor who has been successful in his litigation; and that the court below erred in not rendering a judgment for costs as in ordinary cases, including the statutory attorney's fee to the prevailing party. This view of the question of costs is fully sustained in a well-considered case—*In re Railroad Co.*, 94 N. Y. 287. This being our view, it follows that the appellant here is entitled to his costs and disbursements, which also include \$15 attorney's fee. We will further add, our decision upon the question present is limited to the facts stated herein. Let the case be remanded, with the direction to the court below to render judgment in conformity with this opinion.

Eminent Domain—Condemnation Proceedings—Costs.—It has been held that no costs are recoverable upon eminent domain proceedings unless they are under the statute which provides the remedy. *Metler v. Easton & A. R. Co.*, 37 N. J. L. (8 Vr.) 222; *Herbein v. Philadelphia & R. R. Co.*, 9 Watts (Pa.), 272. However, the general rule is to impose costs where an appeal is shown to be useless by no modification in favor of the appellant. *Leak v. Selma, R. & D. R.*, 47 Ga. 345; *People v. McRoberts*, 62 Ill. 38; *Noble v. Des Moines & St. L. R. Co.*, 61 Iowa, 637; s. c., 14 Am. & Eng. R. R. Cas. 108; *Harrison v. Iowa, M. R. Co.*, 36 Iowa, 323; *Helm v. Short*, 7 Bush (Ky.), 623; *New Orleans P. R. Co. v. Gay*, 31 La. An. 430; *Vicksburg, S. & T. R. Co. v. Calderwood*, 15 La. An. 481; *Childs v. New Haven & N. Co.*, 135 Mass. 570; *Kidder v. Oxford*, 116 Mass. 165; *Harvard B. R. Co. v. Rand*, 62 Mass. (8 Cush.) 218; *In re Morse*, 35 Mass. (18 Pick.) 443; *Metler v. Eaton & A. R.*, 37 N. J. L. (8 Vr.) 222; *People v. Van Alstyne*, 3 Keyes (N. Y.), 35; *Schuykill Nav. Co. v. Kittera*, 2 Rawle (Pa.), 438; *White v. Coleman*, 6 Gratt. (Va.) 138; *Eppes v. Cralle & Munf. (Va.)* 258; *Washburn v. Milwaukee & L. W. R. Co.*, 59 Wis 364; s. c., 20 Am. & Eng. R. R. Cas. 225. Compare *People v. McRoberts*, 62 Ill. 38.

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v. Bull, 20 Ill. 218. *Compare* *Evansville & C. S. R. v. Fitzpatrick*, 10 Ind. 120.

And in those cases where on appeal the railroad company abandons the proceedings, the costs will be taxed to it. *Lessee v. St. Louis & I. Mt. R. Co.*, 72 Mo. 561; s. c., 2 Mo. App. 105; *North Missouri R. Co. v Raynal*, 25 Mo. 534.

It was held by the supreme court of Iowa, in the case of *Frankel v. Chicago, B. & P. R. Co.*, 71 Iowa. 561; s. c., 32 N. W. Rep. 488, that in action against the purchase of a railroad, to recover the costs of a land-owner in condemnation proceedings against the company selling the road, the land-owner can recover the costs paid by him and for which he is liable, but not the cost of defendant's witnesses. Modifying *Frankel v. Chicago, B. & P. R. Co.*, 28 Am. & Eng. R. R. Cas. 257.

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 Contract with employee. Statutory regulation. Under Missouri statute, forbidding officers and employees from being interested in furnishing supplies, etc., a contract by a stock agent, with a railroad leasing the company's stock-yards, in consideration of his receiving a certain sum for loading and unloading stock, is void, and cannot be validated by ratification. *Rue v. Missouri Pac. R. Co. (Tex.)*. 49.
 Failure to maintain station. Damages for failure of company to maintain station at stipulated point in accordance with contract with municipality; depreciation in value of property around station as element for consideration. *City of St. Thomas v. Credit Valley R. Co. (Ont.)*. 473.
 Telegraph line: construction of. Action for breach of contract. Report of referee giving sum of earnings in gross for each office on the line to which plaintiff is entitled, not set aside for failure to give annual earnings for each office or average annual receipts. *Pittsburg, etc., R. Co. v. Shaw (Pa.)*. 453.
 Telegraph line: construction of. Business wire. Under agreement for the erection of a telegraph along line of railroad, railroad having privilege of an additional wire for railroad business, *held*, in action for breach of contract, that the use of such wire for commercial purposes entitled the railroad to damages based on the earnings of the line with the additional wire. *Pittsburg, etc., R. Co. v. Shaw (Pa.)*. 453.
 Telegraph line: construction of. Under terms of contract, *held* that plaintiff having built the line as agreed, was entitled to one-half the earnings between certain points including intermediate stations. *Pittsburg, etc., R. Co. v. Shaw (Pa.)*. 453.
 Telegraph line. *Ultra vires*. Defence that contract on part of railroad to maintain and operate telegraph line is *ultra vires*, *held* not available. *Pittsburg, etc., R. Co. v. Shaw (Pa.)*. 453.
 Use of track. Compensation. Company owning track, though not entitled to value of franchise, yet, *held* entitled to more than mere nominal consideration. *Louisville, etc., R. Co. v. Central Pass. R. Co. (Ky.)*. 463.

CONTRIBUTORY NEGLIGENCE.

Parent and child. Contributory negligence of parent in allowing infant child to go on track, which will prevent him from recovering for injuries to child, must be proximate, and not remote. *S. & N. Ala. R. Co. v. Donovan* (Ala.). 151.

CONVEYANCE.

- Change of route. Contract to build road not specifically enforceable. 428 n.
- Conditional conveyance of right of way. 428 n.
- Condition subsequent. Breach. No breach of condition subsequent contained in deed, by failure of grantee or those succeeding to its title, to build and operate road to full extent of charter route. *Morrill v. Wabash, etc., R. Co.* (Mo.). 425.
- Deed. Delivery. Vendor's lien. Where deed is delivered to parties who assume on behalf of company, in consideration of conveyance, to contract for payment of purchase price at stated time, a subsequent delivery of the deed to company with knowledge of grantor completes conveyance free of all lien for purchase price. *Crisman v. Smith* (N. J.). 422.
- Escrow. Deposit of money to be paid for right of way when grantor delivers deed is joint agent of parties. *Chicago, etc., R. Co. v. Wisconsin, etc., R. Co.* (Iowa). 400.
- Escrow. Deposit of money. Laches. Where, in pursuance of contract, purchase price of right of way is deposited with third party to be paid on delivery of deed, and through unreasonable delay of grantor the deed is not delivered until such third party has become insolvent, action will not lie against grantor. *Chicago, etc., R. Co. v. Wisconsin, etc., R. Co.* (Iowa). 400.
- Escrow. Deposit of money. Where deposit was spent money and grantor was sued for failing to deliver deed, evidence that deposit was paid money to construction company which owned defendant railway is incompetent for purpose of showing that money was returned to defendant. *Chicago, etc., R. Co. v. Wisconsin, etc., R. Co.* (Iowa). 400.
- Failure to complete road. Deed to railroad *held* not to become inoperative by virtue of statute of Missouri, because road is not built the entire length of charter route within the ten years prescribed by statute. *Morrill v. Wabash, etc., R. Co.* (Mo.). 425.
- Incumbrances: subscription to pay off. Contract for right of way *held* a personal obligation for those assuming to contract for the company; and moneys subscribed to pay off incumbrances on right of way, and for no other purpose, are not applicable to payment of purchase price. *Crisman v. Smith* (N. J.). 422.
- Purchase of right of way and depot grounds. Breach of warranty. In an action of ejectment by third party against the grantor and the grantee railroad company, *held*, under the circumstances, that as the company alleged the purchase of the right of way and depot grounds from the other defendant and their warranty deed therefor, and the judgment settling the rights of the various parties, which was affirmed by consent, shows a breach of the warranty, it should be affirmed. *Ackerman v. Huff* (Tex.). 589.
- Qualified fee. Rights under. Under deed granting only qualified fee, grantee has same right to exclusive possession and enjoyment as though he held it in fee simple. *New Jersey, etc., Co. v. Morris C. & B. Co.* (N. J.). 515.

CORPORATIONS.

Railroad companies. Private property. Property of railroads, so far as concerns ownership and profit or gain, is to all intents and purposes private property, although applied to a use in which the public have an interest. *Pittsburgh, etc., R. Co. v. Benwood Iron Works* (W. Va.). 531.

CROSSINGS.

- Acquiescence in crossing.** 155 *n.*
- Change of turnpike.** Reconstruction. Statute providing that railroad changing portion of turnpike shall reconstruct it, does not require it to first longitudinally appropriate the road, nor forbid a change of site where the appropriation consists of a grade-crossing at an angle of 45 degrees. Appeal of Township of N. Manheim (Pa.). 194.
- Contributory negligence.** Fact that person about to cross street-railway track does not first stop and look is not, as a matter of law, negligence. Question is for jury. This is true whether cars are horse cars or grip cars. Chicago City R. Co. *v.* Robinson (Ill.). 66.
- Crossing of two roads.** Authority. 571 *n.*
- Crossing of two roads.** Averment in petition of railroad to condemn crossing over another road which states that it is necessary for public use to take property described is sufficient. Toledo, etc., R. Co. *v.* East Saginaw, etc., R. Co. (Mich.). 553.
- Crossing of two roads.** Discontinuation of proceedings as to one point of crossing does not affect action to be taken as to other points. Toledo, etc., R. Co. *v.* East Saginaw, etc., R. Co. (Mich.). 553.
- Crossing of two roads.** Map and survey having received approval of state board and been duly filed, the rights of way of other roads may be condemned for crossing, as in the case of private property, whether the new road proceeds through the place to the terminal points by one or more terminal lines. Toledo, etc., R. Co. *v.* East Saginaw, etc., R. Co. (Mich.). 553.
- Crossing of two roads.** Petition to take land for crossing, which states that petitioning company has decided that property in question is necessary to accommodate the tracks proposed and to develop business, *held* sufficient. Toledo, etc., R. Co. *v.* East Saginaw, etc., R. Co. (Mich.). 553.
- Crossing of two roads.** Plat of road. Crossing board. Where terminal branches of road are designated, mapped out, approved by majority of directors, and certified as essential to development of business, it is sufficient to give state crossing board jurisdiction. Toledo, etc., R. Co. *v.* East Saginaw, etc., R. Co. (Mich.). 553.
- Crossing of two roads.** Procedure. On petition to condemn lands of a railroad for crossing purposes, *held*, that appointment of commissioners will not be refused because more is stated in petition than statute requires. Toledo, etc., R. Co. *v.* East Saginaw, etc., R. Co. (Mich.). 553.
- Grade-crossing.** Action to compel. Company required to pay costs. Appeal of Township of N. Manheim (Pa.). 194.
- Grade-crossing.** Statutory regulation that, whenever it shall be necessary for a railroad to intersect any established road or way, it shall be the duty of the company to construct the road so as not to impede passage or transportation; what is a compliance with, where road crosses a turnpike. Appeal of Township of N. Manheim (Pa.). 194.
- Grip car.** Signal of approach. Running grip car past crossing where another car is discharging passengers, without signal or warning, *held* conduct fairly tending to prove negligence. Chicago City R. Co. *v.* Robinson (Ill.). 66.
- Highway-crossing.** Duty of company. Railroad crossing so constructed as not to endanger passage of persons and transportation of property, or interfere with highway, is substantial compliance with Pennsylvania statute concerning crossing of highway by railroad. Appeal of Township of N. Manheim (Pa.). 194.
- Injury to child.** Suit by parent. Where child about to cross track looked and saw no trains approaching, instruction withdrawing from jury question whether company could have averted injury, and pronouncing conduct of parent negligence, *per se*, *held* properly refused. S. & N. Ala. R. Co. *v.* Donovan (Ala.). 151.

CROSSINGS—Continued.

- Obstructing highway. Penalty. Statute imposing penalty for unnecessary obstruction of highway does not apply to company crossing highway with its track, although it omits duty of restoring crossing to its former state. *Cummins v. Evansville, etc., R. Co. (Ind.)*. 147.
- Restoration of highway. Railroad-crossing. 149 *n*.
- Use of roadbed as footpath. 154 *n*.

DAMAGES. See EMINENT DOMAIN.

- Excessive damages. Discretion of court. Question of propriety of granting new trial on the ground that the verdict was not justified by the evidence, *held* to be within discretion of the trial court. *Whitely v. Mississippi W. & B. Co. (Minn.)*. 624.
- Excessive damages in eminent domain proceedings. 627 *n*.

DEBENTURES. See BONDS.

DEDICATION.

- Easement in public. 6 *n*.
- Perverted use. Grant of entire block of land for depot purposes not an "encroachment" on street, which is authorized and sanctioned by statute, but a dedication of street for foreign purposes. *Daly v. Georgia, etc., R. Co. (Ga.)*. 20.
- Platting: dedication by. 6 *n*.
- Public square. 5 *n*.
- Reservation. Plats. Where a land-owner, making dedication, designates on the plat a railroad track along centre of a street, he reserves the track from dedication; and persons purchasing lots do not take to the centre of the street. *Pennsylvania R. Co. v. Ayres (N. J.)*. 1.
- Reservation. Use of street for railroad. Corporation platting out addition to city, and dedicating streets with reservation of right to operate railroad therein, is not relieved from constructing and operating road in legal and proper manner. *Ottawa, etc., R. Co. v. Larson (Kan.)*. 163.
- What constitutes a dedication. 5 *n*.

DISSOLUTION. See RECEIVER.

- Succession to property. If legislative act dissolving corporation makes no provision for right of succession, such right is governed by statute under which title vests immediately in directors, in trust for creditors and stockholders. *People v. O'Brien (N. Y.)*. 78.
- Winding up affairs. Statute providing that, when corporation is dissolved, attorney-general shall bring suit to wind up its affairs, *held* prospective in its operation, and to have no application to corporation dissolved prior to its passage. *People v. O'Brien (N. Y.)*. 78.

DITCHES AND DRAINS. See SURFACE WATERS.

DIVIDENDS. See STOCK.

DONATION. See MUNICIPAL SUBSCRIPTION.

- Failure to run train to stipulated point. Where the main consideration of the bonus to a railroad was the bringing of its line to a certain town and the running of its trains to a certain point, in ascertaining damages for the breach of the subsidiary stipulation, every reasonable presumption may be

DONATION—*Continued.*

- made as to the advantages which might be derived from broken agreement. *City of St. Thomas v. Credit Valley R. Co. (Ont.).* 473.
- Municipal aid. Under statutes, mere fact that township subscribed to stock does not entitle company to money as donation, but taxpayers have right to determine whether aid voted shall be by way of taking stock, or by donation. *Board of Commrs. v. State (Ind.).* 210.

EASEMENT. See **STREETS AND HIGHWAYS.****EJECTMENT.**

- Eminent domain. Estoppel. 579 *n.*
- Eminent domain. Estoppel. Landowner who surrenders possession without prepayment and by acquiescence, induces company to expend money cannot afterwards maintain ejectment. He is confined to recovery of damages. *Louisville, etc., R. Co. v. Soltwedde (Ind.).* 577.
- Eminent domain. Illegal entry on land. 579 *n.*

ELEVATED RAILROADS. See **STREETS AND HIGHWAYS.****EMINENT DOMAIN.** See **STREETS AND HIGHWAYS.**

- Abandonment. 583 *n.*
- Abandonment. Railroad company having obtained right of way may abandon the same and proceed for a further condemnation. *Cooper v. Anniston, etc., R. Co. (Ala.)* 581.
- Acquisition under eminent domain. Fee. Grant of right of eminent domain construed not as investing with capacity to take a fee, but as merely giving power to acquire an easement. *New Jersey, etc., Co. v. Morris C. & B. Co. (N. J.)* 515.
- Amending record. 588 *n.*
- Amount of land. Condemnation of excess. Injunction. 574 *n.*
- Appeal: dismissal of. 589 *n.*
- Appeal from award. Parties. 588 *n.*
- Appeal. Use of land. 588 *n.*
- Appeal. Where a railroad deposits with probate judge amount of award and costs, an appeal will not hinder work on the condemned property, nor will an injunction lie restraining the company from such work. *Cooper v. Anniston, etc., R. Co. (Ala.).* 581.
- Award of commissioners. Appeal. Judgment confirming report of commissioners, which recites that at defendant's request commissioners were appointed in vacation, does not estop defendant, who excepts to the award from demanding a jury. *Kansas City, etc., R. Co. v. Story (Mo.).* 584.
- Benefits. See *Damages, infra.*
- Benefits. Where offset of benefits are prohibited. 629 *n.*
- Branch roads. See *Public Use, infra.*
- Consequential damages. Constitutional law. Constitutional right to compensation for private property taken for public use does not extend to instances where land is not actually taken but indirectly injured. *Ottawa, etc., R. Co. v. Larson (Kan.).* 163.
- Costs. Damages were appraised by householders, but at election of company, proceedings were afterwards had in court and damages reduced; *held*, that company having made no offer to pay, it was entitled to have costs assessed against owner. *Owsley v. Oregon R. & N. Co. (Wash. Ter.).* 679.
- Costs in condemnation proceedings. 683 *n.*
- Crossing of two roads. Authority. 571 *n.*

EMINENT DOMAIN—Continued.

- Crossing of two roads. Discontinuation of proceedings as to one point of crossing does not affect action to be taken as to other points. Toledo, etc., R. Co. v. East Saginaw, etc., R. Co. (Mich.). 553.
- Crossing of two roads. Map and survey having received approval of state board and been duly filed, the rights of way of other roads may be condemned for crossing as in the case of private property, whether the new road proceeds through the place to the terminal points by one or more terminal lines. Toledo, etc., R. Co. v. East Saginaw, etc., R. Co. (Mich.) 553.
- Crossing of two roads. Petition of railroad to condemn crossing; averment in, which states that it is necessary for public use to take for use of petitioners the property described is sufficient. Toledo, etc., R. Co. v. East Saginaw, etc., R. Co. (Mich.). 553.
- Crossing of two roads. Petition to take land for crossing, which states that petitioning company has decided that property in question is necessary to accommodate the tracks proposed and to develop business, *held* sufficient. Toledo, etc., R. Co. v. East Saginaw, etc., R. Co. (Mich.). 553.
- Crossing of two roads. Plat of road. Crossing board. Where terminal branches of road are designated, mapped out, approved by majority of directors, and certified as essential to development of business, it is sufficient to give state crossing board jurisdiction. Toledo, etc., R. Co. v. East Saginaw, etc., R. Co. (Mich.). 553.
- Crossing of two roads. Procedure. On petition to condemn lands of a railroad for crossing purposes, *held*, that appointment of commissioners will not be refused because more is stated in petition than statute requires. Toledo, etc., R. Co. v. East Saginaw, etc., R. Co. (Mich.). 553.
- Damages. Allowance in gross. Where damages are allowed to several claimants, a verdict of the gross sum to all will not be set aside for irregularity. Wabash, etc., R. Co. v. McDougal (Ill.). 597.
- Damages: amount of. Province of jury. Question of amount of damages sustained by land-owner is proper to be determined by jury, and supreme court will not ordinarily undertake to modify verdict if based on testimony. Northeastern Neb. R. Co. v. Frazier (Neb.). 606.
- Damages. Benefits. 627 *n*.
- Damages. Benefits: general. 628 *n*.
- Damages. Benefits. In considering benefits to that portion of an entire tract, only such benefits as result directly and peculiarly to the particular tract are to be allowed. Whitely v. Mississippi W. & B. Co. (Minn.). 624.
- Damages. Benefits must be to the tract a portion of which is taken. 629 *n*.
- Damages. Benefits. Off-set against damages to land not taken. 629 *n*.
- Damages. Benefits. Under Kansas constitution, company must make full compensation irrespective of any benefits or supposed benefits. Leroy & W. R. Co. v. Ross (Kan.). 653.
- Depot. Change of road. Connecticut statute authorizes railroad in altering the line of its road to take a street for depot purposes subject to the approval of the railroad commissioners. State v. Railroad Comm'rs (Conn.). 510.
- Damages. Consequential damages. 641 *n*.
- Damages. Crops. Where the owner waits for the company to take the initiative, and continues in the meantime to cultivate the land, the crops planted after location and before notice or bond, are proper subjects for compensation. Lafferty v. Schuykill, etc., R. Co. (Pa.). 575.
- Damages. Cuts and fills and the inconvenience of reaching the several portions of the land are proper subjects for consideration in estimating damages. Kansas City, etc., R. Co. v. Story (Mo.). 584.
- Damages. Diminution of business. 648 *n*.
- Damages. Diminution of value. 647 *n*.
- Damages. Diminution of value. Land-owner is entitled to full compensation for land actually taken, and for such damages to residue of land as are

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- equivalent to diminution in value thereof; general benefits ~~not~~ to be considered. Chicago, etc., R. Co. *v.* Wiebe (Neb.). 642.
- Damages.** Elements. Consideration by jury of probability of stock on farm being killed or injured by the operation of the railroad. Instructions considered. Leroy & W. R. Co. *v.* Ross (Kan.). 653.
- Damages.** Elements. Inconveniences. Instruction that mere inconveniences were not of themselves to be considered, but that jury might consider them as bearing on market price, the necessity of opening gates, crossing track, and danger of fire being referred to as instances, *held* correct. Dudley *v.* Minnesota, etc., R. Co. (Iowa). 593.
- Damages:** elements of. 587 *n.* 637 *n.* 667 *n.*
- Damages.** Elements. Submission to jury. Jury may be interrogated as to any particular element of the damages suffered; but a refusal to submit a question asking the jury to state all the elements and sources of damages and the amount allowed for each is not error. Leroy & W. R. Co. *v.* Hawk (Kan.). 665.
- Damages.** Estoppel. A distributee of a decedent's estate, who has by agreement received damages deemed to be sustained by building a railroad along street is estopped from claiming further damages for depreciation, and the administrator of the estate cannot make such claim in behalf of the distributee. Knoll *v.* New York, etc., R. Co. (Pa.). 250.
- Damages.** Evidence. Assessment rolls cannot be introduced in evidence to prove value of land. Opinion of assessor must be given under oath as a witness. Dudley *v.* Minnesota, etc., R. Co. (Iowa). 593.
- Damages.** Evidence of value. Opinion. Farmer conversant with land as to its situation, soil, advantages, etc., is competent as a witness of value of the land. Leroy & W. R. Co. *v.* Ross (Kan.). 653.
- Damages.** Evidence of value. Opinion. Farmer not engaged in buying and selling real estate, not knowing market value of real estate, not living in neighborhood, and who does not know situation, etc., *held* not a competent witness as to value of land. Leroy & W. R. Co. *v.* Ross (Kan.). 653.
- Damages.** Evidence of value. Opinion. Farmer who resides in vicinity acquainted with situation and quality of land, and who states that he knows its market value, is competent to give opinion as to what the market value is. Leroy & W. R. Co. *v.* Hawk (Kan.). 665.
- Damages.** Evidence. Sales of other lands. Conveyance of adjoining lands without proof of their actual consideration are incompetent. Esch *v.* Chicago, etc., R. Co. (Wis.). 620.
- Damages.** Evidence. Where company's witnesses had stated their opinion as to difference in value, *held* proper, on cross-examination, to ask them if in their judgments it would make any difference that the owner had no right to cross the right of way taken. Sigafos *v.* Minneapolis, etc., R. Co. (Minn.). 675.
- Damages.** Evidence. Where petition was filed in June and witness testified to value in following August, *held* that the evidence was admissible. Northeastern Neb. R. Co. *v.* Frazier (Neb.). 673.
- Damages.** Evidence. Witness who testifies that he resides near the land and is acquainted with value of real estate in the neighborhood, is *prima facie* competent witness to prove amount of damages. Northeastern Neb. R. Co. *v.* Frazier (Neb.). 673.
- Damages.** Excessive damages. 627 *n.*
- Damages.** Excessive damages in condemnation proceedings. 597 *n.*
- Damages:** excessive. Discretion of court. Question of propriety of granting new trial on the ground that the verdict was not justified by the evidence, *held* to be within discretion of the trial court. Whitely *v.* Mississippi, W. & B. Co. (Minn.). 624.
- Damages.** Excessive. Verdict for \$1700 not excessive where several witnesses testify that in their opinion, farm consisting of 313 acres was depreciated \$10 per acre. Dudley *v.* Minnesota, etc., R. Co. (Iowa). 593.
- Damages.** Failure to fence. 641 *n.*

EMINENT DOMAIN—*Continued.*

- Damages. Failure to fence. Instruction that "railroad corporations, are not required to fence their roads for six months after they are opened, and damages attending keeping open of farm for that time may properly be considered" is not erroneous in absence of stipulation on part of company to erect fences so as to prevent injury. *Centralia, etc., R. Co. v. Brake* (Ill.). 638.
- Damages. Fire: danger from, to buildings, fences, timber, or crops on remainder of property, when jury are allowed to consider in giving compensation to land-owner. Decrease in rental value of premises. Increase in cost of insurance. Instructions to jury. *Leroy & W. R. Co. v. Ross* (Kan.). 653.
- Damages. Fire: danger from. Where it appears that witnesses in making estimate of injury included damages which might arise from fire by reason of the operation of the road, a request to instruct that increased danger from fire should not be considered, *held* properly refused. *Centralia, etc., R. Co. v. Brake* (Ill.). 638.
- Damages. Flooding lands. Evidence. Where damages are claimed for overflowing lands by reason of opening in embankment, evidence that a house was carried away, *held* inadmissible as not a proper element of damage, but may be received as an illustration of the force of the water. *Wabash, etc., R. Co. v. McDougal* (Ill.). 597.
- Damages. Flooding lands. Where defendants' levees were connected with company's embankment before opening in same, omission to instruct jury that they should not take into consideration the fact that but for said opening defendants might maintain levee and use it to protect their land, *held* error. *Wabash, etc., R. Co. v. McDougal* (Ill.). 597.
- Damages. Gross sum. 588 n.
- Damages. Growing crop. Market value. Where wheat in the milk is growing in a field is taken evidence of the market value of wheat in the nearest market and cost of harvesting and marketing, it is competent to show value of crop. *Leroy & W. R. Co. v. Butts* (Kan.). 671.
- Damages. Lumping. Arbitrary and lumping methods of assessing damages for taking property are condemned. *Kansas City, etc., R. Co. v. Story* (Mo.). 584.
- Damages. Proof. 588 n.
- Damages. Market and cash value. Instruction. 604 n.
- Damages. "Market value." 605 n.
- Damages. Market value. Charge to jury, "that the market value is such a sum as the property was worth in the market to persons generally who would pay its just and full value," *held* not misleading but proper. *Esch v. Chicago, etc., R. Co.* (Wis.). 620.
- Damages. Market value furnishes true basis for determining compensation; such value is to be determined by jury from evidence, either as furnished by witnesses or by personal inspection. *Reed v. Ohio, etc., R. Co.* (Ill.). 234.
- Damages. Market value. The rule for estimating damages to lands appropriated is to ascertain fair value of premises over which road passes, and like value of same premises in their condition after the right of way is taken, leaving benefits out of view. *Dowd v. Mason City, etc., R. Co.* (Iowa). 633.
- Damages: measure of. 604 n.
- Damages: measure of. In an original proceeding to condemn lands, measure of damages is difference between value before and after construction of road. *Wabash, etc., R. Co. v. McDougal* (Ill.). 597.
- Damages: measure of. Instruction. 624 n.
- Damages: measure of. Market value. 624 n.
- Damages: measure of. Recovery is not limited to damages which are sustained if property was to be used only for purpose for which it is devoted, but value of property for any purpose for which it is available may be considered. *Dowd v. Mason City, etc., R. Co.* (Iowa). 633.

EMINENT DOMAIN—Continued.

- Damages. Mineral lands. 605 *n*.
- Damages. Noise and smoke, dust and vibration. 650 *n*.
- Damages. Noise and smoke. Jarring of ground. No action lies for inconveniences necessarily caused by noise, smoke, etc., arising from properly operating railroad upon the company's own land, or on lands in which party complaining has no interest. *Carroll v. Wisconsin Cent. R. Co.* (Minn.). 648.
- Damages. Obstructing flow of water. Instruction excluding from consideration of jury all evidence of permanent obstruction to flow of water from land, and charging them that evidence of mere temporary obstructions carried there accidentally or otherwise would be proper proof for their consideration of the real nature of the land, *held* correct. *Thomson v. Sebasticook, etc., R. Co.* (Me.). 662.
- Damages. Obstructing flow of water. Where the issue is whether the lands are naturally wet, it is competent for complainant to show that the obstruction of the free passage of the water is caused by the temporary filling up of a brook with rocks. *Thomson v. Sebasticook, etc., R. Co.* (Me.). 662.
- Damages. Opinion evidence. 677 *n*.
- Damages. Opinion evidence. Where strip through farm is taken, it is proper to ask witness what is the difference between value of farm without the railroad and its value with the railroad. *Sigafoos v. Minneapolis, etc., R. Co.* (Minn.). 675.
- Damages. Payment in refunding bonds. Effect of appeal. 614 *n*.
- Damages. Prospective use. In so far as the adaptability of the land to uses other than that to which it is applied enhances or influences its value, such uses are competent to be considered. *Reed v. Ohio, etc., R. Co.* (Ill.). 234.
- Damages. Prospective use. Modification in respect of instruction requesting that compensation was value of land for any purpose for which it was shown by evidence to be available, so as to confine value to worth of land as it was at the time as shown by the evidence, *held* improper. *Reed v. Ohio, etc., R. Co.* (Ill.). 234.
- Damages. Reservation of crossing. Certain crossing made by company at owner's request being only temporary, *held* proper for court to decline to charge that amount of verdict should be difference in value without railroad and with railroad, "with the crossing over and under the track now thereon." *Sigafoos v. Minneapolis, etc., R. Co.* (Minn.). 675.
- Damages. Right of way. 633 *n*.
- Damages. Right to compensation. 613 *n*.
- Damages. Special uses. 606 *n*.
- Damages. Stipulation by attorneys. 588 *n*.
- Damages. Surface waters. 653 *n*.
- Damages. Surface water. Obstructing flow. 664 *n*.
- Damages. Surface water. Where it appears in action to recover for flooding adjoining lands that the company has cut, on lands already appropriated, ditches necessary to drain roadbed and plaintiff might have relieved his land by cutting his lead ditch deeper, *held* not error to refuse to direct verdict for the plaintiff. *Bell v. Norfolk S. R. Co.* (N. Car.). 651.
- Damages. Taking part of tract. Failure of commissioners to consider how far the other 160 acres of the farm would be affected is an improper omission. *Kansas City, etc., R. Co. v. Story* (Mo.). 584.
- Damages. Taking part of tract. What is to be regarded as a single tract of land. 637 *n*.
- Damages. Taking part of tract. Where a number of tracts of land as described by surveys are used as one farm in determining damages, injury to whole farm or body of land should be considered. *Northeastern Neb. R. Co. v. Frazier* (Neb.). 606.
- Damages. Taking part of tract. Where land has been treated as an entirety, though different portions of it may be devoted with great advantage to

EMINENT DOMAIN—Continued.

- different purposes, plaintiff is entitled to have entire tract considered. *Dowd v. Mason City, etc., R. Co. (Iowa.)*. 633.
- Damages.** Taking part of tract. Where value of strip taken as part of the whole lot, and as parcel of the same is added to the balance of the lot not taken, the proper rule of assessment is complied with. *Esch v. Chicago, etc., R. Co. (Wis.)*. 620.
- Damages.** Trial. Order of evidence. 624 *n.*
- Damages.** Use of way: right to. Where right of way appurtenant to land was cut off, *held*, under circumstances, that instruction that the continued existence of the way "does not depend upon the land remaining pasture land" is correct. *Fitz v. Nantasket Beach R. Co. (Mass.)*. 631.
- Damages.** Vibration and jarring of property. 650 *n.*
- Damages.** Way appurtenant to lands. Instruction that if the character of land changes from pasture to building lots, right to use the way as an open way by occupants of cottages erected on the land would not be included in the rights of way as existing, *held* properly refused. *Fitz v. Nantasket Beach R. Co. (Mass.)*. 631.
- Damages.** Where there are improvements. 605 *n.*
- Delegation of power—to municipal corporations—to railroad companies.** 529, 530 *n.*
- Description of land.** Where the petition particularly describes the land sought and a plat is filed, in the absence of evidence to the contrary the land will be held to be described with sufficient certainty. *Ackerman v. Huff (Tex.)*. 589.
- Description of premises.** Damages to entire farm. Land owner who asks for all the damages resulting from appropriation may have damage to his entire farm considered, although application and notice of appeal describes premises as those crossed by right of way. *Dudley v. Minnesota, etc., R. Co. (Iowa)*. 593.
- Description of premises.** Petition. 592 *n.*
- Description of property.** Plat of lands. Where a plat of the land proposed to be taken is filed with the commissioner's report, a reference in the report to the road as located over is a sufficient description. *Kansas City, etc., R. Co. v. Story (Mo.)*. 584.
- Ejectment.** Estoppel. 579 *n.*
- Ejectment.** Estoppel. Land owner who surrenders possession without prepayment, and by acquiescence induce company to expend money, cannot afterwards maintain ejectment. He is confined to recovery of damages. *Louisville, etc., R. Co. v. Soltwedde (Ind.)* 577.
- Ejectment.** Illegal entry on land. 579 *n.*
- Entry.** Payment of damages. An actual entry cannot be made until the damages accruing to the owner shall be secured. *Lafferty v. Schuykill, etc., R. Co. (Pa.)*. 575.
- Evidence.** Declarations of owner. In action for appropriation of right of way through farm, declarations of plaintiff made at time of appropriation are competent, and can be offered as original evidence without calling plaintiff's attention to same. *Leroy & W. R. Co. v. Butts (Kan.)*. 671.
- Evidence.** Temporary structure. Where cross-petition is filed, alleging damages arising from alteration of embankment, an offer on the part of the company to show that the embankment was for temporary use *held* properly excluded. *Wabash, etc., R. Co. v. McDougal (Ill.)*. 597.
- Fire: danger from.** 641 *n.*
- Foreign corporation.** Consolidation. Statute forbidding foreign corporations to exercise right of eminent domain does not prohibit existing companies, one of which is a domestic corporation, from becoming body corporate by consolidation instead of by formation of new corporation. *State v. Chicago, etc., R. Co. (Neb.)*. 504.
- Foreign corporation: exercise of power of eminent domain by.** 510 *n.*
- Infant's lands.** Decree condemning lands of minor for railroad purposes should

EMINENT DOMAIN—Continued.

- not order condemnation money to be paid to the guardians. *ad litem*. *Brown v. Rome, etc., R. Co. (Ala.)*. 571.
- Infant:** lands of. Under Alabama statute, petition to condemn for uses of a railroad need not aver an offer and an unsuccessful attempt to purchase the land. *Brown v. Rome, etc., R. Co. (Ala.)*. 571.
- Injury to adjacent lands.** Compensation. Damages resulting to adjacent lands by reason of improper construction of a railroad cannot be had in proceedings to recover for land appropriated in construction and operation of road. *Dowd v. Mason City, etc., R. Co. (Iowa)*. 633.
- Injury to adjoining lands.** Ascertaining damages. 637 *n*.
- Joint owners:** rights of. Where interest in lands is in two persons and before appraisement, but after filing of petition one of such persons acquires the interest of the other, and award is made to former, he will be entitled to full amount thereof. *Northeastern Neb. R. Co. v. Frazier (Neb.)*. 606.
- Jurisdiction:** submission to. Waiver to objections. Where land-owner appears before commissioners and is heard and thereafter appeals, he will be deemed to have submitted to the jurisdiction of the court, and to have waived irregularities in proceedings for appointment of commissioners. *Whitely v. Mississippi, W. & B. Co. (Minn.)*. 624.
- Jurors:** challenge of. In the absence of statutory provisions, no right of peremptory challenge of jurors exists. *Brown v. Rome, etc., R. Co. (Ala.)*. 571.
- Jury.** Quashing panel. Where county commissioners select names from which petit jurors are to be drawn, motion to quash panel on ground that one of the commissioners had action pending to be determined by jury should be overruled, in absence of showing of partiality or unfairness, or that any of persons selected were favorable to such commissioner. *Northeastern Neb. R. Co. v. Frazier (Neb.)*. 606.
- Lessee.** Estoppel. Where one takes a lease of land with notice that a railroad has been located thereon, he cannot be heard to complain that the value of his term has been diminished. *Lafferty v. Schuylkill, etc., R. Co. (Pa.)*. 575.
- Lessee.** Payment to landlord. Where a railroad enters on leased land, finding lessee in possession and his crops in the ground, they are fixed with notice of his lease, and cannot discharge their liability to him by payment to his landlord. *Lafferty v. Schuylkill, etc., R. Co. (Pa.)*. 575.
- Lien of land-owner.** Owner of lands taken has vendor's lien, and if payment be withheld, chancery court may compel payment as a condition of further enjoyment of the easement. *Cooper v. Anniston, etc., R. Co. (Ala.)*. 581.
- Location of road.** Where company locates line over lands of private owners, it secures thereby a right to enter and occupy the lands covered by such location. *Lafferty v. Schuylkill, etc., R. Co. (Pa.)*. 575.
- Mortgaged lands.** Right of action. Right of action for damages arising from building a railroad in a public street adjacent to mortgaged lands is in absence of bad faith in the owner in possession and not in the mortgagee. *Knoll v. New York, etc., R. Co. (Pa.)*. 250.
- New appraisement.** Jury trial. Statute providing that jury may assess damages where a "new appraisement" is ordered, does not deprive the owner of his constitutional right to a common law jury. *Kansas City, etc., R. Co. v. Story (Mo.)*. 584.
- Notices.** Issue and service. Fact that the report of the commissioners only states that the notices were issued does not tend to prove that they were not in some lawful manner served. *Ackerman v. Huff (Tex.)*. 589.
- Notice.** Non-resident. Fact that some of the plaintiffs were non-residents, and that between the commencement and conclusion of the proceedings sufficient time did not intervene to give notice by publication, does not show that notice was not given in some lawful manner. *Ackerman v. Huff (Tex.)*. 589.
- Petition.** Allegations. Although averments in petition need not be in lan-

EMINENT DOMAIN—Continued.

- guage of statute, yet they must affirmatively show that corporation has been unable to agree with land-owner in respect to compensation. *Reed v. Ohio, etc., R. Co. (Ill.)*. 234.
- Petition. Filing. 593 *n*.
- Petition in condemnation proceedings. What it should show. 597 *n*.
- Pleading. Alteration of embankment. Written offer. Where question of damages arises from alteration of embankment, written statement purporting to be agreement to restore embankment filed in name of company's attorneys may be stricken from the files. *Wabash, etc., R. Co. v. McDougal (Ill.)*. 597.
- Pleading. Exception. In action for use and occupation of lands, an answer describing property, alleging that it was necessary and that company had tendered value and praying that it be condemned, is subject to exception as not being the proper proceeding for appropriation of lands. *Galveston Wharf Co. v. Gulf, etc., R. Co. (Tex.)*. 668.
- Procedure. Validity of incorporation. 510 *n*.
- Proceedings. Errors of law should be taken advantage of in court where proceeding are had, or on appeal to circuit court if such errors have not been waived. *Cooper v. Anniston, etc., R. Co. (Ala.)*. 581.
- Proceedings: when authorized. Under Illinois statute, proceedings are permitted only in event that corporation seeking the appropriation is unable to agree with the owner for the purchase of land or material. *Reed v. Ohio, etc., R. Co. (Ill.)*. 234.
- Public use. As far as public is concerned, when what railroads need is for "public use" they have right to invoke the exercise of eminent domain. *Pittsburgh, etc., R. Co. v. Benwood Iron Works (W. Va.)*. 531.
- Public use. Branch road. Evidence that all who wish to avail themselves of branch road may do so not sufficient to show that use of the work will be for the benefit of the public. *Pittsburgh, etc., R. Co. v. Benwood Iron Works (W. Va.)*. 531.
- Public use. Branch roads. Where the record shows that the construction of branches and spurs is essential to any successful operation of petitioner's road, it must be held to be necessary for public use. *Toledo, etc., R. Co. v. East Saginaw, etc., R. Co. (Mich.)*. 553.
- Public use. Judicial question. Whether use to which property sought to be taken is to be appropriated is a public or private use, is a judicial question subject to review by an appellate court. *Pittsburgh, etc., R. Co. v. Benwood Iron Works (W. Va.)*. 531.
- Public use. Nature of right of eminent domain. 551 *n*.
- Public use. Private advantage. In so far as that which concerns railroads as to their private interests are concerned, they cannot call into exercise the power of eminent domain. *Pittsburgh, etc., R. Co. v. Benwood Iron Works (W. Va.)*. 531.
- Public use. Railways. Branch roads. 551 *n*.
- Public use. Switch to manufactory: railroad sought to condemn land over which to build, for purpose of transporting freight to and from said manufactory; *held*, that use to which land was to be subjected was a private and not a "public use." *Pittsburgh, etc., R. Co. v. Benwood Iron Works (W. Va.)*. 531.
- Question for jury. Procedure. Michigan statute. 587 *n*.
- Railroad companies. Private property. Property of railroads, so far as concerns ownership and profit or gain, is to all intents and purposes private property, although applied to a use in which the public have an interest. *Pittsburgh, etc., R. Co. v. Benwood Iron Works (W. Va.)*. 531.
- Right acquired. *Morris C. & B. Co. held* to have acquired merely an easement, leaving a fee in land-owner with right to make any use of land which will not prevent canal company from having full enjoyment of their easement. *New Jersey, etc., Co. v. Morris C. & B. Co. (N. J.)*. 515.
- Riparian owner. Connection with tidewater. Acquisition by railroad or canal

EMINENT DOMAIN—Continued.

- company of easement for a right of way over the land of a riparian owner does not deprive him of his right to preserve or improve the connection of his land with adjacent tidewater. *New Jersey, etc., Co. v. Morris C. & B. Co. (N. J.)*. 515.
- Streets and highways. Condemnation. 514 *n*.
- Streets. Easement of abutter. Depriving of, or interfering with, enjoyment of easement in street for any use not a proper street use is a taking of property for public use. *Adams v. Chicago, etc., R. Co. (Minn.)*. 7.
- Strict construction. Grant of the power of eminent domain is to be strictly construed. What is not plainly given is to be understood as withheld. *New Jersey, etc., Co. v. Morris C. & B. Co. (N. J.)*. 515.
- Successor: condemnation by. Railroad claiming as successor of company whose charter gives it right to acquire property, providing that in case of disagreement as to right of way, price of land, etc., land may be condemned, can obtain material by condemnation only in event that it is unable to agree with owner for purchase. *Reed v. Ohio, etc., R. Co. (Ill.)*. 234.
- Trespass. Contract to pay for use. Where one by mistake occupies the land of another without consent, law will not imply contract to pay for same, as the owner has notified the trespasser that he will be charged therefor during the time he occupies the same. *Galveston Wharf Co. v. Gulf, etc., R. Co. (Tex.)*. 668.
- Trespass. Removal of dirt. If a railway in constructing its road goes upon land outside its right of way, and removes earth therefrom belonging to another, it is a trespasser and liable as such. *Dowd v. Mason City, etc., R. Co. (Iowa)*. 633.
- Trespass. Where one by mistake occupies the land of another without consent, proper measure of damages is what the owner could have leased the premises for. *Galveston Wharf Co. v. Gulf, etc., R. Co. (Tex.)*. 668.
- Trial. Change of venue; application for, in civil actions should be denied, unless it is made to appear that fair trial cannot be had. Fact that there were numerous persons in county prejudiced against party will not justify granting change if it appears that fair trial can be had. *Northeastern Neb. R. Co. v. Frazier (Neb.)*. 606.
- Unauthorized use of right of way. Company held liable for damages sustained by one whose land was condemned, by reason of switching and making up of trains by lessee company; petition in condemnation proceedings, stating that land was to be used only for passage of trains and not for switching. *Backus v. Detroit, etc., R. Co. (Mich.)*. 436.
- View of premises by jury. 583 *n*.
- Width of strip. Description. Where it is sought to obtain strip more than one hundred feet wide, petition should describe portion of line at which extra width is sought. *Brown v. Rome, etc., R. Co. (Ala.)*. 571.
- Width of strip. Where it is sought to obtain strip more than one hundred feet wide, petition should state purposes for which extra width is sought, and the same should be one of those for which statute makes provision. *Brown v. Rome, etc., R. Co. (Ala.)*. 571.
- Wrongful entries. Improvements. Estoppel. Ejectment. 577 *n*.

ESTOPPEL.

- Eminent domain. Ejectment. 579 *n*.
- Eminent domain. Ejectment. Land-owner who surrenders possession without prepayment, and by acquiescence induces company to expend money, cannot afterwards maintain ejectment. He is confined to recovery of damages. *Louisville, etc., R. Co. v. Soltwedde (Ind.)*. 577.
- Location of road. Lessee. Where one takes a lease of land with notice that a railroad has been located thereon, he cannot be heard to complain that

ESTOPPEL—*Continued.*

- the value of his term has been diminished. *Lafferty v. Schuylkill, etc., R. Co. (Pa.)*. 575.
- Mortgage foreclosure.** Defence by transferee. Two last companies having possession of property, and being lessor and lessee, *held* estopped to dispute validity of mortgage, and demurrer to bill to foreclose dismissed. *Beekman v. Hudson River, etc., R. Co. (N. Y.)*. 321.
- Purchase of stock.** Minority stockholders. Where corporation purchases stock of another corporation and expends large sums for its benefit, minority stockholders are estopped from claiming several years after that purchasing corporation has procured mismanagement of corporation, and from denying that purchasing corporation had power to make purchase. *Alexander v. Searcy (Ga.)*. 239.

EVIDENCE. See EMINENT DOMAIN.

- Expert and opinion evidence in condemnation proceedings.** 677 n.
- Expert and opinion.** In action for value of real estate condemned, witness who testifies that he resides near the land and is acquainted with value of real estate in the neighborhood, is *prima facie* competent witness to prove amount of damages. *Northeastern Neb. R. Co. v. Frazier (Neb.)*. 673.
- Expert and opinion.** In condemnation proceedings it is proper to ask witness what is difference between value of farm without the railroad and its value with the railroad. *Sigafoos v. Minneapolis, etc., R. Co. (Minn.)*. 675.
- Expert and opinion.** In condemnation proceedings, where company's witnesses stated their opinion as to difference in value, *held* proper on cross-examination to ask them if in their judgment it would make any difference that the owner had no right to cross the right of way taken. *Sigafoos v. Minneapolis, etc., R. Co. (Minn.)*. 675.
- Expert and opinion.** Value of land. Farmer conversant with land as to its situation, advantages, etc., is competent as a witness to the value. *Leroy & W. R. Co. v. Ross (Kan.)*. 653.
- Expert and opinion.** Value of land. Farmer not engaged in buying and selling real estate, not knowing market value of real estate, not living in neighborhood, and who does not know situation, etc., *held* not a competent witness as to value of land. *Leroy & W. R. Co. v. Ross (Kan.)*. 653.
- Expert and opinion.** Value of land. Farmer who resides in vicinity, acquainted with situation and quality of land, and who states that he knows its market value, is competent to give opinion as to what the market value is. *Leroy & W. R. Co. v. Hawk (Kan.)*. 665.
- Introduction without objection.** Where evidence is introduced without objection, party cannot predicate error thereon; and same rule will apply if a party excepts to the introduction of certain evidence and afterwards introduces the evidence objected to or that of like character. *Chicago, etc., R. Co. v. Wiebe (Neb.)*. 642.
- Value of land.** Assessment rolls cannot be introduced in evidence to prove value of land. Opinion of assessor must be given under oath as a witness. *Dudley v. Minnesota, etc., R. Co. (Iowa)*. 593.

EXCLUSIVE PRIVILEGE. See STREET RAILWAYS.

EXECUTION.

- Sale of franchise.** Mortgage. Purchaser at execution sale under judgment recovered by holder of bonds for interest takes only equity of company and not entitled to property, rights, etc., of company freed from lien of mortgage. *Commonwealth v. Susquehanna, etc., R. Co. (Pa.)*. 269.

FIRE.

- Eminent domain. Damages.** Danger from fire to buildings, fences, timber or crops on remainder of property: when jury are allowed to consider, in giving compensation to landowner. Decrease in rental value of premises. Increase in cost of insurance. Instructions to jury. *Leroy & W. R. Co. v. Ross* (Kan.). 653.
- Eminent domain. Injury from fire.** Where it appears that witnesses in making estimate of injury included damages which might arise from fire by reason of the operation of the road, a request to instruct that increased danger from fire should not be considered *held* properly refused. *Centralia, etc., R. Co. v. Brake* (Ill.). 638.

FORECLOSURE. See MORTGAGE.

- Subscription to stock.** Release of unpaid subscriptions. Indiana statute construed as intended to protect subscribers by cancelling all obligations to pay unpaid subscriptions to stock in all cases where there shall not have been an adjustment by agreement or compromise. *Board of Commrs. v. State* (Ind.). 210.
- Unpaid subscriptions:** Indiana statute cancelling, enacted upon theory that, where company no longer owns road, unpaid subscription ought not to be coerced, for reason that subscribers cannot acquire interest in railway. *Board of Commrs. v. State* (Ind.). 210.

FOREIGN CORPORATION.

- Agency in state. Contract.** Under constitutional provision that no foreign corporation shall do business in state without having place of business and agent, contracts in state relative to property in state made by foreign trust company without having office in state are not void but voidable. Plea in bar to foreclosure suit based on that provision of constitution is not sufficient. *American L. & T. Co. v. East & West R. Co.* (C. C.). 276.
- Consolidation.** Foreign and domestic corporation. By consolidation of C. B. & Q. R. Co. and B. & M. R. Co. in Nebraska, *held* that corporation created thereby became a body corporate in accordance with the laws of Nebraska, and was not therefore a foreign corporation. *State v. Chicago, etc., R. Co.* (Neb.). 504.
- Eminent domain. Consolidation.** Statute forbidding foreign corporations to exercise right of eminent domain does not prohibit existing companies, one of which is a domestic corporation, from becoming body corporate by consolidation instead of by formation of new corporation. *State v. Chicago, etc., R. Co.* (Neb.). 504.
- Eminent domain: exercise of power by foreign corporation.** 510 *π*.

FORFEITURE. See FRANCHISE; LAND GRANT.**FRANCHISE.** See MORTGAGE; STREET RAILWAYS.

- Forfeiture.** City ordinance requiring company to construct road in particular manner, passed pursuant to statute, *held*, to have force and effect of statute, and to become part of charter of company, upon non-compliance with which it may be compelled to surrender its franchise. *State v. Madison St. R. Co.* (Wis.). 135.
- Grant by city.** City of New Orleans is clothed with power to grant franchises for construction of street railway including right of regulating rates of fare. *Forman v. New Orleans, etc., R. Co.* (La.). 38.
- Grant by city.** Irrevocable franchise. Grant to railroad, by city ordinance, of privileges of right of way along certain streets, made under authority of charter of company *held*, to be grant of an irrevocable franchise. *Port of Mobile v. Louisville & N. R. Co.* (Ala.). 171.

FRANCHISE—Continued.

- Grant by city ordinance.** Railroad seeking to enjoin interference with franchise granted by city ordinance, validity of which depends on construction of grant, and which city attempts to destroy, is not bound to first establish its right at law to such franchise. *Port of Mobile v. Louisville & N. R. Co. (Ala.)*. 171.
- Municipal corporation.** Authority of legislature. Fact that legislature may confer on city or county power to grant franchise, or to create a corporation, does not deprive it of its constitutional power to take away power so granted, or to alter or repeal acts of county or city. *State v. Hilbert (Wis.)*. 112.
- Purchasing franchise of another road.** There is no statutory provision in Michigan authorizing one road to acquire stock and franchise of another company with intention of itself exercising such franchise. *Mackintosh v. Flint, etc., R. Co. (Mich.)*. 340.
- Running arrangement.** Transfer of privileges. Provision in act conferring power on railroad to make running arrangements with other roads, do not confer authority to transfer its privileges. *Southern Pac. R. Co. v. Esquibel (N. M.)*. 410.
- Sale of franchise.** Provision of acts empowering company to purchase land grant and franchise of and to consolidate with other roads chartered on its route, *held* not to authorize transfer of its own land grant and franchises. *Southern Pac. R. Co. v. Esquibel (N. M.)*. 410.

FRAUD.

- Foreclosure sale: setting aside.** Bill filed by stockholder of mortgagor company to set aside sale to another railroad company as being fraudulent, dismissed on ground of laches. *Foster v. Mansfield, etc., R. Co. (C. C.)*. 281.
- Foreclosure sale: setting aside.** Bill on behalf of corporation to have foreclosure sale set aside as fraudulent may be filed by a stockholder after refusal of stockholders to do so. *Foster v. Mansfield, etc., R. Co. (C. C.)*. 281.

HIGHWAYS See **STREETS AND HIGHWAYS.****INCORPORATION.**

- Eminent domain.** Validity of incorporation. 510 n.
- Estoppel to deny.** Company succeeding to franchise granted to original company, *held* estopped from setting up that such company had never been duly incorporated, and hence, demurrer by them in action to foreclose mortgage on that ground should be dismissed. *Beekman v. Hudson River, etc., R. Co. (N. Y.)*. 321.
- Government aid.** Acts of congress incorporating Texas & Pacific R. Co., and providing for aid in its construction, contemplated a road for government services, to be under one management, and not an easement and dependent in a system of railroads. *Southern Pac. R. Co. v. Esquibel (N. M.)*. 410.

INFANTS. See **CHILDREN.****INJUNCTION.**

- Eminent domain.** Appeal. Where a railroad deposits with probate judge amount of award and costs, an appeal will not hinder work on the condemned property, nor will an injunction lie restraining the company from such work. *Cooper v. Anniston, etc., R. Co. (Ala.)*. 581.
- Eminent domain.** Enjoining condemnation of excess of amount of land. 574 n.

INJUNCTION—Continued.

Franchise. City ordinance: railroad seeking to enjoin interference with franchise granted by, validity of which depends on construction of grant, and which city attempts to destroy, is not bound to first establish its right at law to such franchise. *Port of Mobile v. Louisville & N. R. Co.* (Ala.). 171.

Highway obstruction. Pleading. It is not necessary that a bill to enjoin the obstruction of a township road should be instituted by the attorney-general; such bill is maintainable in the name of the township. *Appeal of Township of N. Manheim (Pa.).* 194.

Illegal and *ultra vires* act. Injunction will lie at instance of holders of common stock who are entitled to, but are deprived of, representation, pending suit for enforcement of such right, to restrain an illegal, disadvantageous, and *ultra vires* purchase of another road. *Mackintosh v. Flint, etc., R. Co.* (Mich.). 340.

Income mortgages. Misapplication of earnings. 339 n.

Preliminary injunction. Complainant desiring to protect right which he claims in land, must show, on undisputed facts and according to established law, that he possesses right which he claims. *Dodge v. Pennsylvania R. Co.* (N. J.). 180.

Railroads in street. Change of gauge. In absence of imputation of fraud in procuring passage of ordinance granting right of way, injunction will not lie at suit of abutting owners to restrain company from changing tracks from narrow to standard gauge. *Denver, etc., R. Co. v. Dumke* (Colo.). 155.

Railroad in streets. Loading and unloading cars. Where city has granted company right to load and unload cars in street, injunction will be granted to protect such franchise and restrain interference under ordinance attempting to discontinue its exercise. *Port of Mobile v. Louisville & N. R. Co.* (Ala.). 171.

Removal of depot. Injunction will not be granted restraining city railroad company from moving its depot to safer and more convenient place, thereby abandoning a portion of its road. *Moore v. Brooklyn City R. Co.* (N. Y.). 76.

Street railway. Laying tracks. Injunction granted, at suit of borough, to prevent laying of street-railway tracks not authorized by charter of company, notwithstanding borough has power to remove them. *Borough of Stamford v. Stamford H. R. Co.* (Conn.). 140.

trees: railroads in. Nothing short of the threatened destruction of property of great value by acts of wanton lawlessness will justify granting of injunction staying an important public work. *Dodge v. Pennsylvania R. Co.* (N. J.). 180.

Traffic association. Public policy. *Quære*, whether even in the absence of a constitutional provision, action under an agreement among parallel and competing roads to form traffic association and keep down competition, could not be enjoined as contrary to public policy. *Gulf, etc., R. Co. v. State* (Tex.). 481.

Violation by municipality. Punishment of city authorities for disobeying decree, believing it their duty to do so, will be merely nominal on condition that they will comply with decree in future and pay costs. *Des Moines St. R. Co. v. Des Moines, etc., R. Co.* (Iowa). 132.

INTEREST. See BONDS; MORTGAGE.

INTERSTATE COMMERCE.

Traffic association. State control. State of Texas has the right to interfere with contract in restraint of competition to which several companies incorporated by that state are parties, although it regulates charges on freight carried to and between Texas and other states. *Gulf, etc., R. Co. v. State* (Tex.). 481.

JUDICIAL NOTICE.

Competing lines. Court takes judicial notice of fact that two railroads touching same points are competing lines. *Gulf, etc., R. Co. v. State (Tex.)*. 481.

JURISDICTION.

Mortgage foreclosure. Circuit court of southern district of New York has jurisdiction of suit to foreclose mortgage executed on right of way granted by congress, together with its improvements through reservation at West Point. *Beekman v. Hudson River, etc., R. Co. (N. Y.)*. 321.

JURY. See EMINENT DOMAIN.

Challenge of jurors. In the absence of statutory provisions, no right of peremptory challenge of jurors exists. *Brown v. Rome, etc., R. Co. (Ala.)*. 571.

Impanelling. Quashing panel. Where county commissioners select names from which petit jurors are to be drawn, motion to quash panel, on ground that one of commissioners had action pending to be determined by jury, should be overruled in absence of showing of partiality or unfairness, or that any of persons selected were favorable to such commissioners. *Northeastern Neb. R. Co. v. Frazier (Neb.)*. 606.

LACHES.

Conveyance. Deposit of money. Where, in pursuance of contract, purchase price of right of way is deposited with third party to be paid on delivery of deed, and through unreasonable delay of grantor the deed is not delivered until such third party has become insolvent, action will not lie against grantor. *Chicago, etc., R. Co. v. Wisconsin, etc., R. Co. (Iowa)*. 400.

Foreclosure sale: setting aside. 297 n.

Foreclosure sale: setting aside. Bill filed by stockholder of mortgagor company, to set aside sale to another railroad company as being fraudulent, dismissed on ground of laches. *Foster v. Mansfield, etc., R. Co. (C. C.)*. 281.

LAND GRANT.

Forfeiture. Failure to complete road. Acts of congress, reserving right to adopt measures to secure speedy completion of road, authorize the forfeiture of the land grant on failure of company to complete it, reservation being for protection of government and not for benefit of company. *Southern Pac. R. Co. v. Esquibel (N. M.)*. 410.

License to cut timber. Depot-houses, snow-sheds, and fences are to be considered in the pervue of acts authorizing railroad to take timber as part of the railroads. *Denver, etc., R. Co. v. United States (C. C.)*. 429.

License to cut timber. Statute held to authorize Denver & Rio Grande R. Co. to take timber from public lands adjacent to line of railway, whether built prior or subsequent to June 8, 1882, and to use same in construction of road. *Denver, etc., R. Co. v. United States (C. C.)*. 429.

License to cut timber. Timber taken from land adjacent to that portion of line constructed subsequent to June 8, 1882, could not lawfully be used to repair the portion of road constructed prior to that date. *Denver, etc., R. Co. v. United States (C. C.)*. 429.

License to cut timber. Under special acts, held that no timber could be taken from land adjacent to that portion of road completed prior to June 8, 1882, for repairs upon line constructed subsequent thereto. *Denver, etc., R. Co. v. United States (C. C.)*. 429.

LANDLORD AND TENANT.

- Location of road. Estoppel. Where one takes a lease of land with notice that a railroad has been located thereon, he cannot be heard to complain that the value of his term has been diminished. *Lafferty v. Schuylkill, etc., R. Co. (Pa.)*. 575.
- Location of road. Lessee. Where a railroad enters on leased land finding lessee in possession and his crops in the ground, they are fixed with notice of his lease and cannot discharge their liability to him by payment to his landlord. *Lafferty v. Schuylkill, etc., R. Co. (Pa.)*. 575.
- Location of road. Lessee. Where lessee of land has no notice of time when company will take possession, he has same right to occupy and cultivate that his lessor would have had. *Lafferty v. Schuylkill, etc., R. Co. (Pa.)*. 575.

LEASE.

- Authority to lease. 446 n.
- Car lease. Lease of cars pending foreclosure of mortgage, although valid until disaffirmed by court, is not an instrument in writing such as entitles lessor to interest under Illinois statute. *Thomas v. Peoria, etc., R. Co. (C. C.)*. 381.
- Car trust lease. Priority. Car trust certificates, *held*, under circumstances, to be in legal effect mortgage bonds, inferior as liens on rolling stock to prior mortgage containing clause covering after-acquired property. *Central Trust Co. v. Ohio Cent. R. Co. (C. C.)*. 299.
- Consolidation. Unauthorized use of right of way. Both depot and construction companies *held* liable for damages sustained by one whose land was condemned, by switching and making up of trains by a lessee company, petition in condemnation proceedings stating that the land was only to be used for the passage of trains. *Backus v. Detroit, etc., R. Co. (Mich.)*. 436.
- Injury to property. Action by lessor. In action by lessor to recover for injury to property before it had passed to lessee under terms of lease, admission of evidence that lessee requested lessor to construct a retaining wall is harmless error. *Norwich, etc., R. Co. v. City of Worcester (Mass.)*. 447.
- Injury to property. Rights of lessor. Under lease of railroad, including all lands and such new ground as might thereafter be acquired, lands afterwards acquired for depot purposes do not pass to lessee immediately, and lessor is entitled to recover for any injuries thereto while they are in his possession. *Norwich, etc., R. Co. v. City of Worcester (Mass.)*. 447.
- Mortgage foreclosure. Lease of cars. Lessor company *held* entitled to such reasonable rent as it could obtain in open market for similar cars to be used in the same manner. *Thomas v. Peoria, etc., R. Co. (C. C.)*. 381.
- Negligence: liability for. A railroad cannot avoid the responsibility of operating its road by allowing others to have control and management of it without consent of power whence it derives its franchise. *Palmer v. Utah, etc., R. Co. (Idaho)*. 443.
- Relative liability of lessor and lessee. 445 n.
- Rent. Claiming more than due. Although lessor claims a larger sum than that to which he is entitled, yet if he is refused payment of any amount approaching that due him, this constitutes an unreasonable delay, which will justify allowance of interest and aggregate amount due. *Thomas v. Peoria, etc., R. Co. (C. C.)*. 381.
- Terminal facilities. Receiver. Rent charges. Amount paid by other roads for terminal facilities pursuant to contract *held* not, in the absence of evidence showing that the sum paid by the receiver is not all that the use of road is fairly worth, to furnish the measure of damage for such use. *Peoria, etc., R. Co. v. Chicago, etc., R. Co. (U. S.)*. 488.
- Traffic contracts. Statute forbidding railroads to lease rights or franchises to parallel road *held* not to forbid making of traffic contracts for partial use of respective roads beyond the line of parallelism. *People v. O'Brien (N. Y.)*. 78.

LICENSE. See **STREETS AND HIGHWAYS; STREET RAILWAYS.**

License fee. See **STREET RAILWAYS.**

License to cut timber. See **LAND GRANT.**

Riparian owner. Filling in. License by custom permitting owner of land abutting on navigable stream to fill in and dock out in front of his land. License when executed becomes irrevocable. *New Jersey, etc., Co. v. Morris C. & B. Co. (N. J.).* 515.

Wharves. Conditions of license. License under Wharf Act of 1851 confers no right on the licensee unless he is the owner of upland abutting on tide water. His license is conditional dependent on his having title to a *ripa*. *New Jersey, etc., Co. v. Morris C. & B. Co. (N. J.).* 515.

LIMITATIONS, STATUTE OF.

Limitation of action to recover damages for the construction of a railroad in a street. 18 *n*.

Right of way. Adverse possession. Limitation of action. 422 *n*.

LOCATION.

Change of route. Contract to build road not specifically enforceable. 428 *n*.

Lessee. Estoppel. Where one takes a lease of land with notice that a railroad has been located thereon, he cannot be heard to complain that the value of his term has been diminished. *Lafferty v. Schuylkill, etc., R. Co. (Pa.).* 575.

Lessee. Payment to landlord. Where a railroad enters on leased land finding lessee in possession and his crops in the ground, they are fixed with notice of his lease and cannot discharge their liability to him by payment to his landlord. *Lafferty v. Schuylkill, etc., R. Co. (Pa.).* 575.

Lessee. Right to cultivate land. Where lessee of land has no notice of time when company will take possession, he has same right to occupy and cultivate that his lessor would have had. *Lafferty v. Schuylkill, etc., R. Co. (Pa.).* 575.

Plat of road. Crossing board. Where terminal branches of road are designated, mapped out, approved by majority of directors and certified as essential to development of business, it is sufficient to give state crossing board jurisdiction. *Toledo, etc., R. Co. v. East Saginaw, etc., R. Co. (Mich.).* 553.

Right to occupy lands. Where company locates line over lands of private owners, it secures thereby a right to enter and occupy the lands covered by such location. *Lafferty v. Schuylkill, etc., R. Co. (Pa.).* 575.

MANDAMUS.

Municipal subscription. Foreclosure. *Mandamus* does not lie in favor of a company purchasing, at foreclosure sale, capital stock of an insolvent company to which municipal aid has been voted to compel levy of tax for purpose of paying amount voted. *Board of Commrs. v. State (Ind.).* 210.

Street railway. Franchise. Bond. *Mandamus* lies in favor of purchaser of right to build street railway, who has prepared bond to compel its acceptance, when only objections are that bond does not contain conditions required which are not specified in resolutions of council. *People v. Barnard (N. Y.).* 70.

MASTER AND SERVANT.

Contract with employee. Statutory regulation. Under Missouri statute, contract of stock agent with railroad company leasing company's stock-yards in consideration of his receiving certain sum for loading and unloading stock is void and cannot be validated by ratification. *Rue v. Missouri Pac. R. Co. (Tex.).* 449.

MINORS. See PARENT AND CHILD.

MONOPOLY. See MUNICIPAL CORPORATIONS; STREET RAILWAYS.

Grant of monopoly by legislature. 116 n.

MORTGAGE. See BONDS.

Car-trust lease. Priority. Car-trust certificates, *held*, under circumstances, to be in legal effect mortgage bonds, inferior as liens on rolling stock to prior mortgage containing clause covering after acquired property. Central Trust Co. v. Ohio Central R. Co. (C. C.). 299.

Default. Failure to pay interest. 267 n.

Default. Remedy of mortgagee. 266 n.

Default. Right of mortgagee to possession. 267 n.

Foreclosure. See receiver.

Foreclosure. Appointment of receiver—discretion of court. 268 n.

Foreclosure. Consolidation of actions by contractor and by trustee under deeds of trust, both seeking foreclosure of trust deeds. Under circumstances, *held* that plea of *lis pendens* filed by contractor to trustee's bill was insufficient, although he prayed for foreclosure in his bill, since no such foreclosure could be had in his suit unless trust company had seen fit to ask it in cross-bill. American L. & T. Co. v. East & West R. Co. (C. C.). 276.

Foreclosure. Construction company. Defence. Where bill brought to secure bonds issued to construction company by trustees at instance of corporation by whom bonds were negotiated, agreement of construction company to pay interest is not a valid defence. Foster v. Mansfield, etc., R. Co. (C. C.). 281.

Foreclosure. Defence by transferee. Estoppel. Two last companies having possession of property, and being lessor and lessee, *held* estopped to dispute validity of mortgage and demurrer to bill to foreclose dismissed. Beekman v. Hudson River, etc., R. Co. (N. Y.). 321.

Foreclosure. Defence. Neither minority stockholders nor one who is not a stockholder at time of alleged transaction can maintain bill in defence of foreclosure alleging that affairs of corporation had been managed in interest of principal stockholder, and that bonds are void for usury, where no demand has been made on directors or stockholders to make such defence, collusion being only excuse. Alexander v. Searcy (Ga.). 239.

Foreclosure. Foreign corporation. Contract. Under constitutional provision that no foreign corporation shall do business in state without having place of business and agent, contracts in state relative to property in state made by foreign trust company without having office in state are not void but voidable: plea in bar to foreclosure suit based on that provision of constitution is not sufficient. American L. & T. Co. v. East & West R. Co. (C. C.). 276.

Foreclosure. Incorporation of company. Estoppel. Company succeeding to franchise granted to original company, *held* estopped from setting up that such company had never been duly incorporated, and demurrer by them on that ground dismissed. Beekman v. Hudson River, etc., R. Co. (N. Y.). 321.

Foreclosure. Interest default. In absence of any special provision therefor, a mortgage as security for interest as well as principal may be foreclosed on default in payment of interest. Mercantile Trust Co. v. Missouri, etc. R. Co. (C. C.). 259.

Foreclosure. Jurisdiction. Circuit court of southern district of New York has jurisdiction of suit to foreclose mortgage executed on right of way granted to railroad by congress, together with its improvements through reservation at West Point. Beekman v. Hudson River, etc., R. Co. (N. Y.). 321.

Foreclosure. Lease of cars. Lessor company *held* entitled to such reasonable

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- rent as it could obtain in open market for similar cars to be used in the same manner. *Thomas v. Peoria, etc., R. Co. (C. C.).* 381.
- Foreclosure.** Lease of cars pending foreclosure of mortgage, although valid until disaffirmed by court, is not an instrument in writing such as entitles lessor to interest under Illinois statute. *Thomas v. Peoria, etc., R. Co. (C. C.).* 381.
- Foreclosure.** Lease of cars. Rent. Leases of cars by car company to mortgagor company, both of which companies were controlled by same persons. Leases may be rejected as basis of ascertaining amount due company and nature of obligation assumed; lessor is entitled to reasonable rent. *Thomas v. Peoria, etc., R. Co. (C. C.).* 381.
- Foreclosure.** Master's deed. *Prima facie* evidence. Under constitution making deed *prima facie* evidence that provisions of law have been complied with, it is only in case of loss or destruction of record of decree that deed becomes *prima facie* evidence of recovery of decree. *Reed v. Ohio, etc., R. Co. (Ill.).* 234.
- Foreclosure.** Necessary parties. 250 *n.*
- Foreclosure.** Parties. Mortgage by different companies and subsequent practical consolidation. Numerous conveyances into other hands, *held* that company owning equity of redemption, and company being lessee in possession were proper parties. *Beekman v. Hudson River, etc., R. Co. (N. Y.).* 321.
- Foreclosure.** Receiver appointed on foreclosure under second mortgage where interest is far in arrear and business is on decrease, there being lack of harmony as to management of corporation. *Mercantile Trust Co. v. Missouri, etc., R. Co. (C. C.).* 259.
- Foreclosure.** Rent of cars. Proceeds will not, in absence of special circumstances, be charged with rent of cars, and claims for leases of cars, etc., which accrued more than six months prior to appointment of receiver. *Thomas v. Peoria, etc., R. Co. (C. C.).* 381.
- Foreclosure.** Reorganization. New York laws of 1886 apply to corporations formed by the reorganization of railroads sold under mortgage foreclosure. *People v. Cook (N. Y.).* 256.
- Foreclosure.** Rights of purchaser. Master's deed is evidence of regularity of sale, but not of prior proceedings, and petitioner desiring to insist on any right of such deed should produce decree. *Reed v. Ohio, etc., R. Co. (Ill.).* 234.
- Foreclosure.** Sale of franchise. 275 *n.*
- Foreclosure.** Sale of franchise. Purchaser at execution sale of property and franchise of railroad under a judgment recovered by holder of part of series of trust mortgage bonds for interest takes only the equity of the company, and is not entitled to property, rights, etc., of company freed from lien of mortgage. *Commonwealth v. Susquehanna, etc., R. Co. (Pa.).* 269.
- Foreclosure sale:** setting aside. Bill filed by stockholder of mortgagor company to set aside sale to another railroad company as being fraudulent, dismissed on ground of laches. *Foster v. Mansfield, etc., R. Co. (C. C.).* 281.
- Foreclosure sale:** setting aside. Bill on behalf of corporation to have foreclosure sale set aside as fraudulent may be filed by a stockholder after refusal of stockholders to do so. *Foster v. Mansfield, etc., R. Co. (C. C.).* 281.
- Foreclosure sale.** Setting aside. Excusing delay. 298 *n.*
- Foreclosure sale.** Setting aside. Laches. 297 *n.*
- Foreclosure.** State and federal courts. Fact that suit to foreclose mortgage is pending in state courts not a bar to a similar action by second bondholder in the federal court. *Beekman v. Hudson River, etc., R. Co. (N. Y.).* 321.
- Foreclosure.** Stipulations as to default. Provisions in mortgage *held* to authorize foreclosure without waiting six months for default. *Mercantile Trust Co. v. Missouri, etc., R. Co. (C. C.).* 259.

MORTGAGE—Continued.

- Foreclosure.** Suit by bondholder. Delay. If delay for any less period than that prescribed by statute of limitations is sought to be availed of in bar of complainant's right to recover, fact of such delay is a mixed question of law and fact which should not be passed upon on demurrer. *Beekman v. Hudson River, etc., R. Co. (N. Y.).* 321.
- Foreclosure.** Suit by bondholder. While trustees were litigating right to foreclose in state courts, and were urged by bondholders to renew litigation in federal courts, *held*, that on their refusal to do so bondholder might bring a suit. *Beekman v. Hudson River, etc., R. Co. (N. Y.).* 321.
- Income bondholders.** Excessive interest. Railroad which has paid higher rate of interest than necessary on prior incumbrances, cannot, in accounting in favor of income bondholders, charge difference against income, when mortgage contains express provisions against such application. *Barry v. Missouri, etc., R. Co. (C. C.).* 332.
- Income bonds.** Payment of interest. In ascertaining income applicable to payment of interest, an allowance made by the mortgagor's company to a connecting road for a division of earnings, under the circumstances rejected. *Barry v. Missouri, etc., R. Co. (C. C.).* 332.
- Income mortgages.** Misapplication of earnings. Injunction. 339 *n.*
- Injury to premises.** Consequential injury to mortgaged premises resulting from construction of railroad, damages for which have been settled by mortgagor with company, cannot be recovered by the mortgagee. *Knoll v. New York, etc., R. Co. (Pa.).* 250.
- Injury to property:** action for, will not lie at instance of holder of mortgage as trustee, if premises remain of greater value than amount due on mortgage and for which trustee is liable to account. *Knoll v. New York, etc., R. Co. (Pa.).* 250.
- Injury to property.** Remedy of mortgagee. 256 *n.*
- Mortgaged lands.** See *EMINE ET DOMAIN.*
- Power to mortgage.** A power to sell is not included in a power to mortgage. *Southern Pac. R. Co. v. Esquibel (N. M.).* 410.
- Reorganization agreement.** Appropriation of income. Preferred stock. Agreement construed, and *held*, that common stockholder was entitled to representation upon its being made to appear that earnings and income which had been wrongfully converted to pay for improvements would, if applied to dividends, be sufficient to pay five successive dividends of 7 per cent each on preferred stock. *Mackintosh v. Flint, etc., R. Co. (Mich.).* 340.
- Reorganization agreement.** Operating expenses. What to be charged as. Steel-rail betterments, money spent on steamers, and money borrowed and expended for engines and cars, *held*, under reorganization agreement, not to be charged to operating expenses. *Mackintosh v. Flint, etc., R. Co. (Mich.).* 340.
- Suit to avoid.** Parties. Bondholders are necessary parties to suit brought to adjudge void a mortgage and the bonds secured thereby. Service on trustees is not sufficient. Appeal of Harrisburg, etc., R. Co. (Pa.). 249.

MUNICIPAL CORPORATIONS. See **FRANCHISE; STREETS AND HIGHWAYS.**

- Exclusive privileges:** grant of, as a contract. 117 *n.*
- Exclusive privileges:** grant of, by municipal corporation. 116 *n.*
- Grant for depot purposes.** Georgia statute giving municipalities power to sanction encroachments on streets does not confer authority to grant block of land in busy part of city for depot purposes, to injury of abutting owners. *Daly v. Georgia, etc., R. Co. (Ga.).* 20.
- Grant of franchise.** Authority of legislature. Fact that legislature may confer on city or county power to grant franchise or to create a corporation does not deprive it of its constitutional power to take away power so granted or to alter or repeal acts of county or city. *State v. Hilbert (Wis.).* 118.

MUNICIPAL CORPORATIONS—Continued.

- Injunction: violation of, by municipality. Punishment of city authorities for disobeying decree, believing it their duty to do so, will be merely nominal on condition that they will comply with decree in future and pay costs. *Des Moines St. R. Co. v. Des Moines, etc., R. Co. (Iowa)*. 132.
- License fee. Street railway. Municipal corporation *held* to have right to increase license fee, imposed by its charter to company, although franchise was granted before the enactment of a statute repealing act under which the charter was granted. *State v. Hilbert (Wis.)*. 118.

MUNICIPAL SUBSCRIPTION.

- Abandonment of station. Damage to city. Loss in taxation resulting from depreciation in taxable property which can be traced to company's default forms yearly standard which may be capitalized so as to represent money compensation to which city is entitled. *City of St. Thomas v. Credit Valley R. Co. (Ont.)*. 473.
- Design of statute. Indiana statute authorizing subscriptions by townships contemplates that townships may have interest in property of company and influence in managing its affairs, as any other stockholder. *Board of Commrs. v. State (Ind.)*. 210.
- Donation. Municipal aid. Under statutes, mere fact that township subscribed to stock does not entitle company to money as a donation, but taxpayers have right to determine whether aid voted shall be by way of taking stock or by donation. *Board of Commrs. v. State (Ind.)*. 210.
- Failure to maintain station. Damages for failure of company to maintain station at stipulated point in accordance with contract with municipality; depreciation in value of property around station as element for consideration. *City of St. Thomas v. Credit Valley R. Co. (Ont.)*. 473.
- Failure to run trains. Measure of damages. Where main consideration of the bonus to a railroad was the bringing of its line to a certain town and the running of its trains to a certain point, in ascertaining damages for breach of the subsidiary stipulation every presumption may be made as to the advantages to be derived from broken agreement. *City of St. Thomas v. Credit Valley R. Co. (Ont.)*. 473.
- Foreclosure. *Mandamus* does not lie in favor of a railway company purchasing, at foreclosure sale, capital stock of an insolvent company to which municipal aid had been voted to compel levy of tax for purpose of paying amount voted. *Board of Commrs. v. State (Ind.)*. 210.
- Foreclosure. Rights of purchasers. Indiana statute, cancelling obligations to pay subscriptions in case of foreclosure, *held* to protect all subscribers, although at time of its passage there was no law authorizing municipal subscriptions. *Board of Commrs. v. State (Ind.)*. 210.
- Subscription to stock. Simple voting of aid by township not a subscription to stock under Indiana statutes, but subscription is to be made by county board; and until they execute that power, there is no subscription. *Board of Commrs. v. State (Ind.)*. 210.

MUNICIPALITY.

- Abandonment of station. Suit by city. A city is not a trustee for individuals who suffer loss from the abandonment of a railroad station, and cannot recover damages for their use. *City of St. Thomas v. Credit Valley R. Co. (Ont.)*. 473.

NAVIGABLE STREAMS. See RIPARIAN RIGHTS, WATERS AND WATER-COURSES.

NEGLIGENCE. See **LEASE.**

Imputed negligence. If child is in exercise of due care, fact that parent did not exercise care for safety of child is not a defence to an action for an injury to child, and question of culpable negligence is immaterial. *Chicago City R. Co. v. Robinson* (Ill.). 66.

NUISANCE.

Action by private person. 37 *n.*

Occupation of streets by railways as a nuisance. 37 *n.*

Railway in street. Action to restrain. Two or more persons owning adjoining lots on street where it is proposed to build street railroad, *held* entitled to unite as plaintiffs and maintain action to restrain obstruction and nuisance. *Atchison St. R. Co. v. Nave* (Kan.). 29.

OFFICERS.

Contract with employee. Statutory regulation. Under Missouri statute, forbidding officers and employees from being interested in furnishing supplies, etc., a contract by a stock agent with a railroad leasing company's stockyards in consideration of his receiving certain sum for loading and unloading stock is void, and cannot be validated by ratification. *Rue v. Missouri Pac. R. Co.* (Tex.). 449.

OFFICERS, PUBLIC.

Obstruction of highway. Verbal contract. Supervisors of township have no power to make contract to substitute a road for a way already open and in public use, nor to consent to an impediment or obstruction of a highway. Appeal of Township of N. Manheim (Pa.). 194.

Township supervisors. Powers. Each of two supervisors by whom township was divided into districts has power to maintain bill in name of township to enjoin obstruction in public road. Appeal of Township of N. Manheim (Pa.). 194.

ORDINANCE. See **STREET RAILWAYS.**

Speed. Negligence. Running of train through city at greater rate of speed than that prescribed by ordinance, which is not shown to be unreasonable, is negligence *per se*. *S. & N. Ala. R. Co. v. Donovan* (Ala.). 151.

Street railway. Franchise. Ordinance relating to construction of street railway, passed under statute, *held* to have force and effect of statute and to become part of charter of company, upon non-compliance with which it may be compelled to surrender its franchise. *State v. Madison St. R. Co.* (Wis.). 135.

Street railway. Operation. By-law passed by municipality requiring street-railway companies to have both conductor and driver on each car, *held* an invasion of domestic concerns of company, and invalid. *City of Toronto v. Toronto St. R. Co.* (Ont.). 44.

Street railway. Operation. By-law passed by municipality requiring street-railway company to have both conductor and driver on its cars, *held* not within terms of agreement originally made for construction and operation of road, and therefore to be *ultra vires*. *City of Toronto v. Toronto St. R. Co.* (Ont.). 44.

PARENT AND CHILD.

- Contributory negligence of parent as bar to suit for loss of services of child. 70 n.
- Contributory negligence of parent in allowing infant child to go on track, which will prevent him from recovering for injuries to child, must be proximate and not remote. *S. & N. Ala. R. Co. v. Donovan* (Ala.). 151.
- Imputed negligence. If child is in exercise of due care, fact that parent did not exercise care for safety of child is not a defence to an action for an injury to child, and question of culpable negligence is immaterial. *Chicago City R. Co. v. Robinson* (Ill.). 66.
- Injury to child. Negligence of parent. Where child was about to cross track, looked, and saw no trains approaching, instruction withdrawing from jury question whether company could have averted injury, and pronouncing conduct of parent negligence *per se*, held, properly refused. *S. & N. Ala. R. Co. v. Donovan* (Ala.). 151.
- Injury to infant. Doctrine of imputed negligence. 68 n.
- Recovery by infant. Action by parent. Prior to act of Jan. 23, 1885, recovery by infant for personal injuries was no defence to action by father for his own benefit for same injury. *S. & N. Ala. R. Co. v. Donovan* (Ala.). 151.

PASSENGERS.

- Regulation of rates. Discrimination. Certain features of contract between city of New Orleans and New Orleans & C. R. Co. as to fares charged to public, held not to subject it to attack as unreasonable discrimination. *Forman v. New Orleans, etc., R. Co.* (La.). 38.

PENALTY.

- Obstructing highway. Statute imposing penalty for unnecessary obstruction of highway does not apply to company crossing highway with its track, although it omits duty of restoring crossing to its former state. *Cummins v. Evansville, etc., R. Co.* (Ind.). 147.

PLEADING AND PRACTICE.

- Appeal. Impeaching verdict. Party who appeals from an order setting aside verdict and granting a new trial cannot in the appellate court impeach the verdict or be heard upon exceptions taken by him to rulings on the trial which terminated in such verdict. *Whitely v. Mississippi W. & B. Co.* (Minn.). 624.
- Assignment of error that the court erred in rendering a judgment because the same is not supported by the evidence, is too general to authorize a reversal. *Ackerman v. Huff* (Tex.). 589.
- Highway obstruction. Injunction. Pleading. It is not necessary that a bill to enjoin obstruction of township road should be instituted by attorney-general; such bill is maintainable in name of township. Appeal of Township of N. Manheim (Pa.). 194.
- Instructions. Error. It is error for the court to refuse to give the instruction asked on behalf of the defendant when it has already given the same in substance in its own instruction. *Northeastern Neb. R. Co. v. Frazier* (Neb.). 606.
- Instruction in a party's favor is not ground for reversing a judgment against him. *Chicago, etc., R. Co. v. Wiebe* (Neb.). 642.

POOLING CONTRA T. See TRAFFIC ASSOCIATION.

PREFERRED STOCK. See STOCK.

PUBLIC LANDS.

License to cut timber. See **LAND GRANT.**

RAILROAD COMMISSIONERS.

Depot. Duty of commissioners to approve or disapprove of new site for depot. *State v. Railroad Commrs. (Conn.).* 510.

Eminent domain. Depot. Connecticut statute authorizes railroad in altering the line of its road to take a street for depot purposes subject to the approval of the railroad commissioners. *State v. Railroad Commrs. (Conn.).* 510.

RAILROAD COMPANY.

Private property. Property of railroads so far as concerns ownership and profit or gain, is, to all intents and purposes private property, although applied to a use in which the public have an interest. *Pittsburgh, etc., R. Co. v. Benwood Iron Works (W. Va.).* 531.

RECEIVER.

Appointment. Mortgage foreclosure. Receiver appointed on foreclosure under second mortgage, where interest is far in arrear and business is on decrease, there being lack of harmony as to management of corporation. *Mercantile Trust Co. v. Missouri, etc., R. Co. (C. C.).* 259.

Foreclosure. Appointment of receiver—discretion of court. 268 n.

Litigation of claims. Statute making receiver referee to take proof of claims, and judge and determine materiality of evidence, violates rule that no man can be judge in his own case. *People v. O'Brien (N. Y.).* 78.

Priority of claims against receiver. 400 n.

Rent of cars: charging income with. Proceeds will not, in absence of special circumstances, be charged with rent of cars, and claims for leases of cars, etc., which accrued more than six months prior to appointment of receiver. *Thomas v. Peoria, etc., R. Co. (C. C.).* 381.

Repairs to cars. Allowing claim. Where a receiver appointed, pending foreclosure, agrees to keep cars leased for use on the road in good repair, such claim will be allowed. *Thomas v. Peoria, etc., R. Co. (C. C.).* 381.

Repairs to cars: claim for. In absence of evidence that cars needed repairs, no claim having been made upon the receiver appointed pending foreclosure, a claim for such repairs by lessor who intervened, made in an amended petition filed three years after the surrender of the cars, will be rejected. *Thomas v. Peoria, etc., R. Co. (C. C.).* 381.

Statute transferring property to receiver. Statute providing for appointment of receiver of property of dissolved corporation, and for transfer of assets to him by force of statute after title had become vested in directors under laws in force at time of dissolution, is unconstitutional. *People v. O'Brien (N. Y.).* 78.

Terminal facilities. Rent charges. Amount paid by other roads for terminal facilities pursuant to contract held not, in the absence of evidence showing that the sum paid by the receiver is not all that the use of the road is fairly worth, to furnish the measure of damages for such use. *Peoria, etc., R. Co. v. Chicago, etc., R. Co. (U. S.).* 488.

REORGANIZATION. See **MORTGAGE.****RIGHT OF WAY.** See **ABANDONMENT; CONVEYANCE.**

RIPARIAN RIGHTS. See WATERS AND WATERCOURSES.

Accretion. 409 *n.*

Accretions. Where lands below high-water mark are appropriated to use of railroads, the rights of riparian owners by accretion do not attach thereto. Chicago, etc., R. Co. *v.* Porter (Iowa). 405.

Navigable stream. High-water mark: owners of land bounded by navigable river have no title beyond. Chicago, etc., R. Co. *v.* Porter (Iowa). 405.

Navigable stream. Owner's title. Repeal of act of congress declaring a river to be navigable, does not invest riparian owners with the title to the bed of the river. Chicago, etc., R. Co. *v.* Porter (Iowa). 405.

Title to river-bed. Right acquired by railroad company in river-bed under Iowa statute, extends to full width of land occupied by embankments as against claims of owners of land bounded by the river. Chicago, etc., R. Co. *v.* Porter (Iowa). 405.

Title to river-bed. Rights under statute. In action to restrain encroachments upon lands acquired in bed of river in pursuance of statute, it is sufficient allegation of title in bill to allege that plaintiff has "legal right to take, hold, and use the same" without setting forth statute. Chicago, etc., R. Co. *v.* Porter (Iowa). 405.

Title to river-bed. Under Iowa statute, where title to river-bed is in state, railroad may acquire title to portion of the same by appropriating it to the uses of their roads. Chicago, etc., R. Co. *v.* Porter (Iowa). 405.

SALE OF ROAD.

Consolidation. Sale of franchise. Provision of acts empowering company to purchase land grant and franchise of, and to consolidate with, other roads chartered on its route, *held* not to authorize transfer of its own land grant and franchises. Southern Pac. R. Co. *v.* Esquibel (N. M.). 410.

Power to sell is not included in a power to mortgage. Southern Pac. R. Co. *v.* Esquibel (N. M.). 410.

Running arrangements. Transfer of privileges. Provision in act conferring power on railroad to make running arrangements with other roads do not confer authority to transfer its privileges. Southern Pac. R. Co. *v.* Esquibel (N. M.). 410.

Sale of lands. 419 *n.*

SPECIFIC PERFORMANCE.

Change of route. Contract to build road not specifically enforceable. 428 *n.*

SPEED.

Unlawful speed. Negligence. Running of train through city at greater rate of speed than that prescribed by ordinance, which is not shown to be unreasonable, is negligence *per se.* S. & N. Ala. R. Co. *v.* Donovan (Ala.). 151.

STATION.

Abandonment. Damage to city. Loss in taxation resulting from depreciation in taxable property, which can be traced to company's default, forms yearly standard which may be capitalized so as to represent money compensation to which city is entitled. City of St. Thomas *v.* Credit Valley R. Co. (Ont.). 473.

Abandonment. Suit by city. A city is not a trustee for individuals who suffer loss from the abandonment of a railroad station, and cannot recover damages for their use. City of St. Thomas *v.* Credit Valley R. Co. (Ont.). 473.

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- Eminent domain.** Change of road. Connecticut statute authorizes a railroad in altering the line of its road to take a street for depot purposes subject to the approval of the railroad commissioners. *State v. Railroad Commrs. (Conn.)*. 510.
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Preferred stock. Reorganization agreement. Agreement construed and held, that as between preferred and common stock, the latter of which was under charter to be debarred from participating until the former had been paid seven dividends during five years, surplus after providing for security of lien, as well as premiums received by company on first mortgage bonds, was to be applied to dividends. *Mackintosh v. Flint, etc., R. Co. (Mich.)*. 340.

Purchase by another road. There is no statutory provision in Michigan authorizing one road to acquire stock and franchise of another company with intention of itself exercising such franchise. *Mackintosh v. Flint, etc., R. Co. (Mich.)*. 340.

Purchase by corporation. Minority stockholders. Where corporation purchases stock of another corporation and expends large sums for its benefit, minority stockholders are estopped from claiming several years after that purchasing corporation has procured mismanagement of corporation, and from denying that purchasing corporation had power to make purchase. *Alexander v. Searcy (Ga.)*. 239.

Subscription to bonds. Unpaid subscription. Agreement of bondholders to lend company money and take in payment debenture bonds held not to amount to an unpaid subscription to the capital stock, but to be an agreement to make a loan on bonds as security. *Pettibone v. Toledo, etc., R. Co. (Mass.)*. 227.

Suit to compel organization. Suit was brought by holders of common stock to compel organization, and thereafter another bill to same effect was filed, alleging, in addition, that defendant company was about to buy another road, and praying that the purchase be enjoined. Held, that if relief sought by original bill is established, second bill should be allowed to stand, being properly considered as a supplemental bill. *Mackintosh v. Flint, etc., R. Co. (Mich.)*. 340.

Taxation. Constitutional inhibition. Statute providing for taxation of stock for privilege of organizing is not, in its application to corporations framed under earlier laws providing that purchasers at mortgage foreclosure sales can become incorporated bodies, a violation of constitutional inhibition against laws impairing obligation of contract. *People v. Cook (N. Y.)*. 256.

STOCKHOLDERS. See **Stock.**

Foreclosure. Defence. Neither minority stockholders nor one who is not a stockholder at time of alleged transaction can maintain bill in defence of foreclosure, alleging that affairs of corporation had been managed in interest of principal stockholder, and that bonds are void for usury, where no demand has been made on directors or stockholders to make such defence, collusion being only excuse. *Alexander v. Searcy* (Ga.). 239.

Foreclosure sale: setting aside. Bill filed by stockholder of mortgagor company to set aside sale to another railroad company as being fraudulent dismissed on ground of laches. *Foster v. Mansfield, etc., R. Co.* (C. C.). 281.

Foreclosure sale: setting aside. Bill on behalf of corporation to have foreclosure sale set aside as fraudulent may be filed by a stockholder after refusal of stockholders to do so. *Foster v. Mansfield, etc., R. Co.* (C. C.). 281.

Illegal act. Injunction will lie at instance of holders of common stock who are entitled to, but are deprived of, representation pending suit for enforcement of such right, to restrain an illegal, disadvantageous, and *ultra vires* purchase of another road. *Mackintosh v. Flint, etc., R. Co.* (Mich.). 340.

Reorganization agreement. Common and preferred stock. Agreement construed and *held*, that common stockholder was entitled to representation upon its being made to appear that earnings and income which had been wrongfully converted would, if applied to dividends, be sufficient to pay five successive dividends on preferred stock. *Mackintosh v. Flint, etc., R. Co.* (Mich.). 340.

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Contract with employee. Under Missouri statute forbidding officers and employees from being interested in furnishing supplies, etc., a contract by a stock agent with a railroad leasing company's stock-yards in consideration of his receiving a certain sum for loading and unloading stock is void, and cannot be validated by ratification. *Rue v. Missouri Pac. R. Co.* (Tex.). 449.

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Perverted use. Grant of entire block of land by municipality, for depot purposes, not an "encroachment" on street, which is authorized and sanctioned by statute, but a dedication of street for foreign purposes. *Daly v. Georgia, etc., R. Co.* (Ga.). 20.

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Reservation. Use of street for railroad. Corporation platting out addition to city, and dedicating streets with reservation of right to operate railroad therein, is not relieved from constructing and operating road in legal and proper manner. *Ottawa, etc., R. Co. v. Larson* (Kan.). 163.

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- Authority to appropriate. Georgia Southern & Fla. R. Co. not authorized to appropriate streets of Macon either by clause in its charter permitting it to build from Macon to Homersville, or by provisions of act transferring to it rights and privileges of Central R. & B. Co. *Daly v. Georgia, etc., R. Co. (Ga.).* 20.
- Change of gauge. Injunction. In absence of imputation of fraud in procuring passage of ordinance granting right of way, injunction will not lie at suit of abutting owners to restrain company from changing tracks from narrow to standard gauge. *Denver, etc., R. Co. v. Domke (Colo.).* 155.
- Change of turnpike. Reconstruction. Statute providing that railroad changing portion of turnpike shall reconstruct it, does not require it to first longitudinally appropriate the road, nor forbid a change of site where the appropriation consists of a grade-crossing at an angle of 45 degrees. Appeal of Township of N. Manheim (Pa.). 194.
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- Compensation. Payment "in money." Return of ten acres of land formerly donated by municipality to railroad, on condition that large encroachments on streets be granted, is not "a fair and reasonable compensation in money." *Daly v. Georgia, etc., R. Co. (Ga.).* 20.
- Compensation: right to. Change of surface. Company having authority to construct road in street may make alterations in its surface without being liable to abutting owners, but it cannot wrongfully obstruct street without being liable. *Ottawa, etc., R. Co. v. Larson (Kan.).* 163.
- Compensation: right to. Consequential damages. Constitutional right to compensation for private property taken for public use does not extend to instances where land is not actually taken but indirectly injured. *Ottawa, etc., R. Co. v. Larson (Kan.).* 163.
- Compensation: right to. Except in instances where statutory provision to contrary exists, law gives no compensation for losses resulting from surrender of public rights. *Dodge v. Pennsylvania R. Co. (N. J.).* 180.
- Compensation: right to. For injuries resulting from violation or destruction of public rights, in place where no private right is injuriously affected, no private action can be maintained. *Dodge v. Pennsylvania R. Co. (N. J.).* 180.
- Compensation: right to. Where railroad is constructed and operated along street without consent of abutting owner, so as to darken and pollute the air, he may recover damages. *Adams v. Chicago, etc., R. Co. (Minn.).* 7.
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- Crossing at grade.** Statutory regulation that, whenever it shall be necessary for a railroad to intersect any established road, it shall be the duty of the company to construct the road so as not to impede passage or transportation. What is a compliance with, where road crosses a turnpike. *Appeal of Township of N. Manheim (Pa.)*. 194.
- Crossing.** Duty of company. Railroad crossing so constructed as not to endanger passage of persons and transportation of property or interfere with highway is substantial compliance with Pennsylvania statute concerning crossing of highway by railroad. *Appeal of Township of N. Manheim (Pa.)*. 194.
- Damages:** abutting owners, when entitled to. 17 n.
- Damages assessed by views.** 194 n.
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- Damages:** measure of. New trial of issue as to amount of damages to which lot-owner is entitled ordered unless plaintiff consents to take judgment for nominal damages. *Adams v. Chicago, etc., R. Co. (Minn.)*. 7
- Damages.** Owner of warehouse, engaged in buying wheat and manufacturing flour, was injured by having his business interfered with by the obstruction of a street by railroad. *Held*, that, in estimating his damages, evidence of the diminution of the profits of the business, including the manufacture of flour, was incompetent. *Todd v. Minneapolis, etc., R. Co. (Minn.)*. 191.
- Dedication.** Reservation. Corporation platting out addition to city, and dedicating streets with reservation of right to operate railroad therein, is not relieved from constructing and operating road in legal and proper manner. *Ottawa, etc., R. Co. v. Larson (Kan.)*. 163.
- Easement of abutting owner.** Abutting owner has easement in street to full width for admission of light and air to his lot, which easement is subordinate only to the public right. *Adams v. Chicago, etc., R. Co. (Minn.)*. 7.
- Elevated railroads.** 18 n.
- Eminent domain.** 20 n.
- Eminent domain.** Public use. Depriving abutting owner of, or materially interfering with his enjoyment of the easement in a street, for any public use not a proper street use, is a taking of his property for public use. *Adams v. Chicago, etc., R. Co. (Minn.)*. 7.
- Estate taken.** Railroad company, though created for limited period, may acquire title in fee of lands; and where there is no limitation upon right conveyed, it takes all of estate possessed by the grantor. *People v. O'Brien (N. Y.)*. 78.
- Fee to streets.** Legislative grant. Fee to streets of Macon, Ga., is in state; and they cannot be appropriated to use of railroad without legislative grant. *Daly v. Georgia, etc., R. Co. (Ga.)*. 20.
- Franchise.** Designated streets. Under charter of street-railway, company specifying streets and terminal points between which company may lay tracks, *held*, that it cannot construct them through any street not specified. *Borough of Stamford v. Stamford H. R. Co. (Conn.)*. 140.
- Franchise.** forfeiture of. City enjoined from interfering with extension of street railway cannot interfere by resolutions to the effect that all street railroads shall be of the standard gauge and declaring privileges forfeited for violation of ordinance under which they are granted, and proposing passage of ordinance granting right to operate road under terms different from those contained therein. *Des Moines St. R. Co. v. Des Moines, etc., R. Co. (Iowa)*. 132.
- Franchise.** Grant by municipality. City of New Orleans has power to grant franchises for construction and operation of street railways, including right of regulating rates of fare. *Forman v. New Orleans, etc., R. Co. (La.)*. 38.

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- Franchise.** Grant from city, of right to build through streets, is grant of franchise, notwithstanding privileges are not conferred directly by legislature, municipality being regarded as agent for the state. *Port of Mobile v. Louisville & N. R. Co. (Ala.)*. 171.
- Gauge of track.** Alteration. Street-railway company which had been permitted for fifteen years to lay track of certain gauge, cannot be compelled to construct its additional track of a different gauge. *Des Moines St. R. Co. v. Des Moines, etc., R. Co. (Iowa)*. 132.
- Grant by city.** City ordinance granting right of way to railroad company through designated streets, *held* valid under Colorado constitution and under charter of city of Denver. *Denver, etc., R. Co. v. Domke (Colo.)*. 155.
- Grant by city.** Irrevocable franchise. Grant to railroad by city ordinance of privileges of right of way along certain streets made under authority of charter of company, *held* to be grant of an irrevocable franchise. *Port of Mobile v. Louisville & N. R. Co. (Ala.)*. 171.
- Granting irrevocable interest.** City of New York has power to grant an interest in public streets for a public use, in perpetuity, which shall be irrevocable. *People v. O'Brien (N. Y.)*. 78.
- Horse railroads in streets.** 18 *n*.
- Injunction granted,** at suit of borough, to prevent laying of street-railway tracks not authorized by charter of company, notwithstanding borough has power to remove them. *Borough of Stamford v. Stamford H. R. Co. (Conn.)*. 140.
- Injunction.** Nothing short of the threatened destruction of property of great value by acts of wanton lawlessness will justify granting of injunction staying an important public work. *Dodge v. Pennsylvania R. Co. (N. J.)*. 180.
- Injunction.** Pleading. It is not necessary that a bill to enjoin the obstruction of a township road should be instituted by the attorney-general; such bill is maintainable in the name of the township. *Appeal of Township of N. Manheim (Pa.)*. 194.
- Interest acquired in street.** Broadway Surface R. Co., *held* to have acquired by grant from the city right to construct and operate its road, an estate in fee in perpetuity, which constitutes property of which it cannot be deprived by an act repealing its charter. *People v. O'Brien (N. Y.)*. 78.
- Interest vested by franchise.** Grant by New York city authorities to construct railroad in streets is grant in fee, vesting interest in streets in perpetuity to extent necessary for purposes of road. *People v. O'Brien (N. Y.)*. 78.
- License.** Revocation. Permission conferred by city on street-railway company is mere license; and if not availed of within time limited, it may be revoked. *Atchison St. R. Co. v. Nave (Kan.)*. 29.
- Limitation of action.** 18 *n*.
- Nuisance:** action to restrain. Two or more persons owning adjoining lots on streets where it is proposed to build street railroad without authority, *held* entitled to unite as plaintiffs, and maintain action to restrain obstruction and nuisance. *Atchison St. R. Co. v. Nave (Kan.)*. 29.
- Nuisance:** railway in street as. 37 *n*.
- Obstructing highway.** Who can complain. 194 *n*.
- Obstruction of highway.** Supervisors. Powers. Each of two supervisors, by whom township was divided into districts, has power to maintain bill in name of township to enjoin obstruction in public road. *Appeal of Township of N. Manheim (Pa.)*. 194.
- Ownership of fee.** 17 *n*.
- Permission of use of streets.** 28 *n*.
- Proper street use:** appropriating street to use of ordinary commercial railroad is not. *Adams v. Chicago, etc., R. Co. (Minn.)*. 7.
- Railroads in streets.** Rights of abutting owners. 16 *n*.
- Side-tracks.** Privileges. Where company is authorized to lay necessary sid-

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- ings in streets, and it has laid its tracks, and used them for many years loading and unloading cars at adjacent streets, it cannot be deprived by city of right so to load and unload in future, this right being construed as included in the grant of privileges for laying sidings, etc. *Port of Mobile v. Louisville & N. R. Co. (Ala.)*. 171.
- Turnpike-crossing. Contract with supervisors. Agreement that no objection shall be made by township to crossing, provided company shall construct a new road, cannot be made by a single supervisor. *Appeal of Township of N. Manheim (Pa.)*. 194.
- Unauthorized occupation of streets by railroads. 142 *n*.

MUNICIPAL CONTROL.

- City authorities: power of, to authorize appropriation and obstruction of street by railroad. 17 *n*.
- Grant by city. Irrevocable franchise. Grant to railroad, by city ordinance, of privileges of right of way along certain streets, made under authority of charter of company, *held* to be a grant of an irrevocable franchise. *Port of Mobile v. Louisville & N. R. Co. (Ala.)*. 171.
- Grant for depot purposes. Georgia statute giving municipalities power to sanction encroachments on streets does not confer authority to grant block of land in busy part of city for depot purposes, to injury of abutting owners. *Daly v. Georgia, etc., R. Co. (Ga.)*. 20.
- Loading and unloading cars. Injunction to restrain city from interfering with right. No objection to exercise of this jurisdiction, that the attempted invasion of the franchise was accompanied by acts constituting trespasses. *Port of Mobile v. Louisville & N. R. Co. (Ala.)*. 171.
- Loading and unloading cars. Injunction to restrain city from interfering with right. Not a valid objection to exercise of jurisdiction, that ordinance attempting to discontinue exercise of right is *quasi* criminal in its nature. *Port of Mobile v. Louisville & N. R. Co. (Ala.)*. 171.
- Loading and unloading cars. Injunction. Where city has granted company right to load and unload cars in street, injunction will be granted to protect franchise and restrain interference under ordinance attempting to discontinue its exercise. *Port of Mobile v. Louisville & N. R. Co. (Ala.)*. 171.
- Municipal corporation. Control of streets. 27 *n*.
- Ordinance. Validity. Ordinance granting right of way to railroad company through designated streets is valid under Colorado constitution and under charter of city of Denver. *Denver, etc., R. Co. v. Domke (Colo.)*. 155.
- Power of corporation. Usual power in municipalities over streets are not sufficient to confer on them right to authorize appropriation of street by ordinary railroads. *Daly v. Georgia, etc., R. Co. (Ga.)*. 20.
- Side-tracks. Privileges. Where company is authorized to lay necessary sidings in streets, and it has laid its tracks, and used them for many years loading and unloading cars at adjacent streets, it cannot be deprived by city of right so to load and unload in future, this right being construed as included in the grant of privileges for laying sidings, etc. *Port of Mobile v. Louisville & N. R. Co. (Ala.)*. 171.

OTHER MATTERS.

- Abutting property. Conveyance. Grantee of property abutting on street, if grantor owns fee of street, takes to middle of street, unless contrary intention is apparent. *Dodge v. Pennsylvania R. Co. (N. J.)*. 180.
- Boundary by street carries fee to centre. 4 *n*.
- Conveyance of land abutting on street. Bounding by line of street. Fee in street. 3 *n*.
- Conveyance of land abutting on street. Description by plat. 4 *n*.
- Conveyance of land abutting on street. Where street is wholly on land of grantor. 4 *n*.

STREETS AND HIGHWAYS—Continued.

- Obstructing highway.** Crossing. Restoration. Statute imposing penalty for unnecessary obstruction of highway does not apply to company crossing highway with its track, although it admits duty of restoring crossing to its former state. *Cummins v. Evansville, etc., R. Co. (Ind.)*. 147.
- Personal injury.** Walking along track. Company running trains through city must keep vigilant lookout even for trespassers; and failure to do so is negligence. *S. & N. Ala. R. Co. v. Donovan (Ala.)*. 151.
- Proposed street.** Right to use. Where lands are conveyed as abutting on proposed street, which extends over other lands of grantor, right to use of proposed street will arise by implication in favor of grantee; and will continue until such street becomes a public highway. *Dodge v. Pennsylvania R. Co. (N. J.)*. 180.
- Vacation of street.** Reversionary interest. Whether private right to use of proposed street will merge in public right when such street becomes a public highway, and will be extinguished with public right if street is afterwards vacated, or will revive on vacation, not decided. *Dodge v. Pennsylvania R. Co. (N. J.)*. 180.

STREET RAILWAYS. See **STREETS AND HIGHWAYS.**

- Authority to occupy street.** Time limited. Privilege given to street-railway company to occupy street must be used, if at all, before expiration of time limited by city authorities. *Atchison St. R. Co. v. Nave (Kan.)*. 29.
- Authority to construct.** Use of track of another company. Charter right of defendant to construct and operate railway along certain streets of city *held* not to confer right to use tracks of company already in such streets. *Louisville City R. Co. v. Central Pass. R. Co. (Ky.)*. 463.
- By-law** passed by municipality requiring street-railway companies to have both driver and conductor on each car, *held* invalid as an invasion of the domestic concerns of the company. *City of Toronto v. Toronto St. R. Co. (Ont.)*. 44.
- Construction.** Consent of authorities. Pennsylvania constitution of 1874, providing that no street railway shall be constructed without consent of local authorities, *held* to have no application to company chartered before adoption of constitution of 1874 but subsequent to amendment of 1867. *Appeal of Williamsport Pass. R. Co. (Pa.)*. 125.
- Construction.** Injunction granted at suit of borough to prevent laying of street-railway tracks not authorized by charter of company notwithstanding borough has power to remove them. *Borough of Stamford v. Stamford H. R. Co. (Conn.)*. 140.
- Contract for use of track.** Compensation. Company owning track, though not entitled to value of the use of the franchise, yet, *held* entitled to more than mere nominal consideration. *Louisville City R. Co. v. Central Pass. R. Co. (Ky.)*. 463.
- Conveyance by authorities.** Title to streets in city of New York is vested in city, in trust for people of state, and state possesses authority to convey such title as is necessary for the purpose to corporations desiring to acquire same for street railroad. *People v. O'Brien (N. Y.)*. 78.
- Corporate powers.** Fictitious issue. Agreed statement of facts submitted to court by corporation and one of its stockholders which seeks determination of question whether a corporation has power to operate its lines by electricity or any other force than animal power, *held* to present a real issue. *Teachout v. Des Moines, etc., R. Co. (Iowa)*. 108.
- Crossing.** Contributory negligence. Fact that person about to cross street railway track does not first stop and look is not, as a matter of law, negligence. Question is for jury. This is true whether cars are horse cars or grip cars. *Chicago City R. Co. v. Robinson (Ill.)*. 66.
- Discretion** of city of New Orleans in granting franchises to street-railway companies not subject to judicial control unless arbitrarily or unlawfully exercised. *Forman v. New Orleans, etc., R. Co. (La.)*. 38.

STREET RAILWAYS—*Continued.*

- Estate taken.** Railroad company, though created for limited period, may acquire title in fee of lands; and where there is no limitation upon right conveyed, it takes all of estate possessed by the grantor. *People v. O'Brien* (N. Y.). 78.
- Exclusive privileges:** grant of, to street-railway companies. 116 *n.*
- Exclusive privilege.** Motive power. Charter granting exclusive privilege of operating street railway on certain streets *held* not to deprive city of authority to grant charter authorizing construction of railways to be operated by a different motive power. *Teachout v. Des Moines, etc., R. Co.* (Iowa). 108.
- Franchise.** City ordinance. Forfeiture. City ordinance requiring company to construct road in particular manner, passed pursuant to statute, *held* to have effect of statute and to become part of charter, upon non-compliance with which company may be compelled to surrender its franchise. *State v. Madison St. R. Co.* (Wis.). 135.
- Franchise.** Designated streets. Under charter of street-railway company specifying streets and terminal points between which company may lay tracks, *held* that it cannot construct them through any street not specified. *Borough of Stamford v. Stamford H. R. Co.* (Conn.). 140.
- Franchise:** forfeiture of. City enjoined from interfering with extension of street railway cannot interfere by resolutions to the effect that all street railroads shall be of the standard gauge, and declaring privileges forfeited for violation of ordinance under which they are granted, and proposing passage of ordinance granting right to operate road under terms different from those contained therein. *Des Moines St. R. Co. v. Des Moines, etc., R. Co.* (Iowa). 132.
- Franchise.** Requirement as to carriage. Where statute provides method whereby company may acquire right to use track of another company, fact that franchise requires it to carry passengers beyond terminus for single fare does not render franchise invalid. *People v. Barnard* (N. Y.). 70.
- Grant of franchises.** City of New Orleans is clothed with power to grant franchises for construction of street-railway, including right of regulating rates of fare. *Forman v. New Orleans, etc., R. Co.* (La.). 38.
- Gauge of track.** Alteration. Street-railway company which had been permitted for fifteen years to lay track of certain gauge cannot be compelled to construct its additional track of a different gauge. *Des Moines St. R. Co. v. Des Moines, etc., R. Co.* (Iowa). 132.
- Horse railways in streets.** 18 *n.*
- Injuries to persons in streets by street railways.** 68 *n.*
- Interest acquired in street.** Broadway Surface R. Co. *held* to have acquired, by a grant from the city, of the right to construct and operate its road, an estate in fee in perpetuity, which constitutes property of which it cannot be deprived by an act repealing its charter. *People v. O'Brien* (N. Y.). 78.
- Interest vested by franchise.** Grant by New York city authorities to construct railroad in streets is grant in fee vesting interest in streets in perpetuity to extent necessary for purposes of road. *People v. O'Brien* (N. Y.). 78.
- License fee.** Increase. Municipal corporation *held* to have right to increase license fee imposed by its charter to company, although franchise was granted before enactment of a statute repealing the act under which the charter was granted. *State v. Hilbert* (Wis.). 118.
- License.** Revocation. Permission conferred by city is mere license, and if not availed of within time limited no act of revocation is required to terminate it, and railway company cannot thereafter construct road without renewal of license. *Atchinson St. R. Co. v. Nave* (Kan.). 29.
- Nuisance.** Action to restrain. Two or more persons owning adjoining lots on streets where it is proposed to build street railroad without authority, *held* entitled to unite as plaintiffs and maintain action to restrain obstruction and nuisance. *Atchison St. R. Co. v. Nave* (Kan.). 29.

STREET RAILWAYS—Continued.

- Operation.** By-law passed by municipality prohibiting operation of street-cars without both conductor and driver in charge, *held* not within terms of agreement made by city originally for construction and operation of railroad, and therefore to be *ultra vires*. *City of Toronto v. Toronto St. R. Co. (Ont.)*. 44.
- Paving.** Constitutional law. Statute requiring companies, in addition to paving between the rails as required by franchise received from city, to pave one foot on each side, *held* not unconstitutional but an exercise of reserved rights of legislature to alter franchise. *Sioux City R. Co. v. Sioux City (Iowa)*. 143.
- Regulation of rates.** Discrimination. Certain features of contract between City of New Orleans and New Orleans & C. R. Co., as to fares charged to public *held* not to subject it to attack as unreasonable discrimination. *Forman v. New Orleans, etc., R. Co. (La.)*. 38.
- Removal of depot.** Highway commissioners *held* to have no power, under New York statute, to maintain action to restrain railroad from changing location of depots when action is not brought for any of purposes specified in the act. *Moore v. Brooklyn City R. Co. (N. Y.)*. 76.
- Removal of depot.** Injunction will not be granted restraining city railroad company from moving depot to safer and more convenient place, thereby abandoning portion of its road. *Moore v. Brooklyn City R. Co. (N. Y.)*. 76.
- Sale of franchise.** Bond. *Mandamus* lies in favor of purchaser of right to build street railway, who has prepared bond, to compel its acceptance when only objections are that bond does not contain conditions required which are not specified in resolutions of council. *People v. Barnard, (N. Y.)* 70.
- Sale of franchise.** Bond. Under statute providing that right to construct street railway shall be sold to highest bidder who shall give bond for fulfilment of agreement, *held*, that comptroller cannot insert conditions in bond other than for payment of percentage of receipts and completion of road within time limited. *People v. Barnard (N. Y.)*. 70.
- Sale of franchise.** Constitutional law. Statute providing for sale of rights of Broadway Surface R. Co., to run cars on city streets, proceeds to be paid to city, *held* unconstitutional. *People v. O'Brien (N. Y.)*. 78.
- Signal of approach.** Running grip-car past crossing where another car is discharging passengers, without signal or warning, *held* conduct fairly tending to prove negligence. *Chicago City R. Co. v. Robinson (Ill.)*. 66.
- Traffic contracts.** Statute forbidding railroads to lease rights of franchises to parallel road, *held* not to forbid making of traffic contracts for partial use of respective roads beyond the line of parallelism. *People v. O'Brien (N. Y.)*. 78.
- Use of another company's tracks:** right to, *held* only to be derived by consent of city council and in pursuance of contract with company owning track. *Louisville City R. Co. v. Central Pass. R. Co. (Ky.)*. 463.

SUBSCRIPTION TO STOCK.

- Foreclosure.** *Mandamus* does not lie in favor of a railway company purchasing at foreclosure sale capital stock of an insolvent company, to which municipal aid had been voted to compel levy of tax for purpose of paying amount voted. *Board of Commrs. v. State (Ind.)*. 210.
- Foreclosure.** Rights of purchasers. Indiana statute cancelling obligations to pay subscriptions in case of foreclosure, *held* to protect all subscribers, although at time of its passage there was no law authorizing municipal subscriptions. *Board of Commrs. v. State (Ind.)*. 210.
- Foreclosure.** Rights of purchasers. Indiana statute construed as intended to protect subscribers by cancelling all obligations to pay unpaid subscrip-

SUBSCRIPTION TO STOCK—Continued.

- tions to stock in all cases where there shall not have been an adjustment by agreement or compromise. Board of Commrs. *v.* State (Ind.). 210.
- Foreclosure. Unpaid subscription: Indiana statute cancelling, was enacted upon theory that, where company no longer owns road, unpaid subscription ought not to be coerced, for reason that subscribers cannot acquire interest in railway. Board of Commrs. *v.* State (Ind.). 210.
- Municipal aid. Donation. Under statutes of Indiana, mere fact that township has subscribed to stock does not entitle company to money as donation, but taxpayers have right to determine whether aid voted shall be by way of taking stock or by donation. Board of Commrs. *v.* State (Ind.). 210.
- Municipal subscription. Design of statute. Indiana statute authorizing subscriptions by townships contemplates that townships may have interest in property of company and influence in managing its affairs as any other stockholder. Board of Commrs. *v.* State (Ind.). 210.
- Municipal subscription. How made. Simple voting of aid by township not a subscription to stock under Indiana statutes but subscription is to be made by county board; and until they execute that power, there is no subscription. Board of Commrs. *v.* State (Ind.). 210.

SURFACE WATER.

- Damages to adjacent lands. If in the lawful use of its easement by a railroad company the surface water damages adjacent lands it is *damnum absque injuria*. Bell *v.* Norfolk S. R. Co. (N. Car.). 651.
- Eminent domain. Consequential damages. 653 *n.*
- Eminent domain. Consequential damages. Where it appears in action to recover for flooding adjoining lands that the company has cut on lands already appropriated ditches necessary to drain roadbed and plaintiff might have relieved his land by cutting his lead-ditch deeper, *held* not error to refuse to direct verdict for the plaintiff. Bell *v.* Norfolk S. R. Co. (N. Car.). 651.
- Eminent domain. Obstructing flow. 664 *n.*
- Obstructing flow. In proceedings for damages sustained by the location of a railroad where the issue is whether the lands are naturally wet it is competent for complainant to show that the obstruction of the free passage of the water is caused by the temporary filling up of a brook with rocks. Thomson *v.* Sebasticook, etc., R. Co. (Me.). 662.
- Obstructing flow. Permanent obstruction. Instruction excluding from consideration of jury all evidence of permanent obstruction to flow of water from land and charging them that evidence of mere temporary obstructions carried there accidentally or otherwise would be proper proof for their consideration of the real nature of the land, *held* correct. Thomson *v.* Sebasticook, etc., R. Co. (Me.). 662.

TAXATION.

- License fee. Street railway. Municipal corporation *held* to have right to increase license fee imposed by its charter to company, although its franchise was granted before the enactment of a statute repealing the act under which the charter was granted. State *v.* Hilbert (Wis.). 118.
- Stock. Constitutional inhibition. Statute providing for taxation of stock of corporations for privilege of organizing is not, in its application to corporations framed under earlier laws providing that purchasers at mortgage foreclosure sales can become incorporated bodies, a violation of constitutional inhibition against laws impairing obligation of contract. People *v.* Cook. 256.

TELEGRAPH COMPANIES.

- Contract for construction. Action for breach. Report of referee giving sum of earnings in gross for each office on the line to which plaintiff is entitled not set aside for failure to give annual earnings for each office or average annual receipts. Pittsburgh, etc., R. Co. v. Shaw (Pa.). 453.
- Contract for construction. Business wire. Under agreement for the erection of a telegraph along line of railroad, railroad having privilege of putting up an additional wire for railroad business, *held* in action for breach of contract that the use of such wire for commercial purposes entitled the railroad to damages based on the earnings of the line with the additional wire. Pittsburgh, etc., R. Co. v. Shaw (Pa.). 453.
- Contract for construction of line. Under terms of contract, *held* that plaintiff having built the line as agreed was entitled to one-half the earnings between certain points including intermediate stations. Pittsburgh, etc., R. Co. v. Shaw (Pa.). 453.
- Contract for construction. *Ultra vires*. Defence that contract on part of railroad to maintain and operate telegraph line is *ultra vires*, *held* not available. Pittsburgh, etc., R. Co. v. Shaw (Pa.). 453.

TERMINAL FACILITIES. See LEASE.

TRAFFIC ASSOCIATION.

- Competing lines. Judicial notice. Court takes judicial notice of fact that two railroads touching same points are competing lines. Gulf, etc., R. Co. v. State (Tex.). 481.
- Constitutional law. Agreement between several railroad, some owning competing lines, for appointment of common committee or association composed of one member from every company to fix rates, is contrary to section of Texas constitution forbidding consolidation or control of parallel or competing lines. Gulf, etc., R. Co. v. State (Tex.). 481.
- Constitutional law. Stifling competition. Provision of Texas constitution forbidding consolidation of parallel or competing lines *held* to evince that control in any manner, or to any extent, was intended to be prohibited, provided it enabled one railroad to keep down competition. Gulf, etc., R. Co. v. State (Tex.). 481.
- Injunction. Public policy. *Quære*, whether even in the absence of a constitutional provision, action under an agreement among parallel and competing roads to form traffic association and keep down competition could not be enjoined as contrary to public policy. Gulf, etc., R. Co. v. State (Tex.). 481.
- Interstate commerce. State control. State of Texas has the right to interfere with contract in restraint of competition to which several companies incorporated by that state are parties, although it regulates charges on freight carried to and between Texas and other states. Gulf, etc., R. Co. v. State (Tex.). 481.
- Provisions of contract. Effect of. Fact that any company entering into agreement has right of withdrawal or cannot be punished for disobedience, or that it cannot be shown that companies have made excessive charges, *held* not to relieve agreement of its illegality. Gulf, etc., R. Co. v. State (Tex.). 481.
- Validity of pooling contracts between different railway companies. 488-*n*.

TRESPASS.

- Contract to pay for use. Where one by mistake occupies the land of another without consent, law will not imply contract to pay for use, as the owner has notified the trespasser that he will be charged therefor during the time

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- he occupies the same. *Galveston Wharf Co. v. Gulf, etc., R. Co. (Tex.)*. 668.
- Damages. Where one by mistake occupies the land of another without consent, proper measure of damages is what the owner could have leased the premises for. *Galveston Wharf Co. v. Gulf, etc., R. Co. (Tex.)*. 668.
- Removal of dirt. If a railway in constructing its road goes upon land outside its right of way and removes earth therefrom belonging to another, it is a trespasser and liable as such. *Dowd v. Mason City, etc., R. Co. (Iowa)*. 633.

TRESPASSERS.

- Railroads in street. Walking on track. Company running trains through populous city, where people frequently walk upon tracks where there is no crossing, must keep vigilant lookout even for trespassers; and failure to do so is negligence. *S. & N. Ala. R. Co. v. Donovan (Ala.)*. 151.

TRIAL. See VENUE.**UNITED STATES COURTS.**

- Foreclosure suit. State court. Fact that suit to foreclose mortgage is pending in state courts not a bar to a similar action by second bondholder in the federal court. *Beekman v. Hudson River, etc., R. Co. (N. Y.)*. 321.
- Jurisdiction. Mortgage foreclosure. Circuit court of southern district of New York has jurisdiction of suit to foreclose mortgage executed on right of way granted by congress, together with its improvements through reservation at West Point. *Beekman v. Hudson River, etc., R. Co. (N. Y.)*. 321.

ULTRA VIRES.

- Injunction will lie at instance of holders of common stock who are entitled to, but are deprived of, representation pending suit for enforcement of such right, to restrain an illegal, disadvantageous, and *ultra vires* purchase of another road. *Mackintosh v. Flint, etc., R. Co. (Mich.)*. 340.
- Sale of lands. 419 n.
- Street railway. Operation. By-law passed by municipality. requiring street-railway company to have both conductor and driver on its cars, held not within terms of agreement originally made for construction and operation of road, and therefore to be *ultra vires*. *City of Toronto v. Toronto St. R. Co. (Ont.)*. 44.
- telegraph line: contract to maintain. Defence that contract on part of railroad to maintain and operate telegraph line is *ultra vires*, held not available. *Pittsburgh, etc., R. Co. v. Shaw (Pa.)*. 453.

VENUE.

- Change of venue: application for, in civil actions should be denied unless it is made to appear that fair trial cannot be had. Fact that there were numerous persons in county prejudiced against party will not justify granting change if it appears that fair trial can be had. *Northeastern Neb. R. Co. v. Frazier (Neb.)*. 606.

WATERS AND WATER-COURSES. See **RIPARIAN RIGHTS; SURFACE WATERS.**

Navigable stream. Riparian owner. Person acquiring land abutting on stream takes only to high-water line. How that line is limited. License by custom to fill in and dock out on the public domain. New Jersey, etc., *Co. v. Morris C. & B. Co.* (N. J.). 515.

Riparian owner. Connection with tidewater. Acquisition by railroad or canal company of easement for a right of way over the land of a riparian owner does not deprive him of his right to preserve or improve the connection of his land with adjacent tidewater. New Jersey, etc., *Co. v. Morris C. & B. Co.* (N. J.). 515.

Wharves. License: conditions of. License under Wharf Act of 1851 confers no right on the licensee unless he is the owner of upland abutting on tidewater. His license is conditional, dependent on his having title to a *ripa*. New Jersey, etc., *Co. v. Morris C. & B. Co.* (N. J.). 515.

WHARVES. See **WATERS AND WATERCOURSES.**

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